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HAWAII REPORTS
VOLUME 20

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CASES DECIDED

IN THE

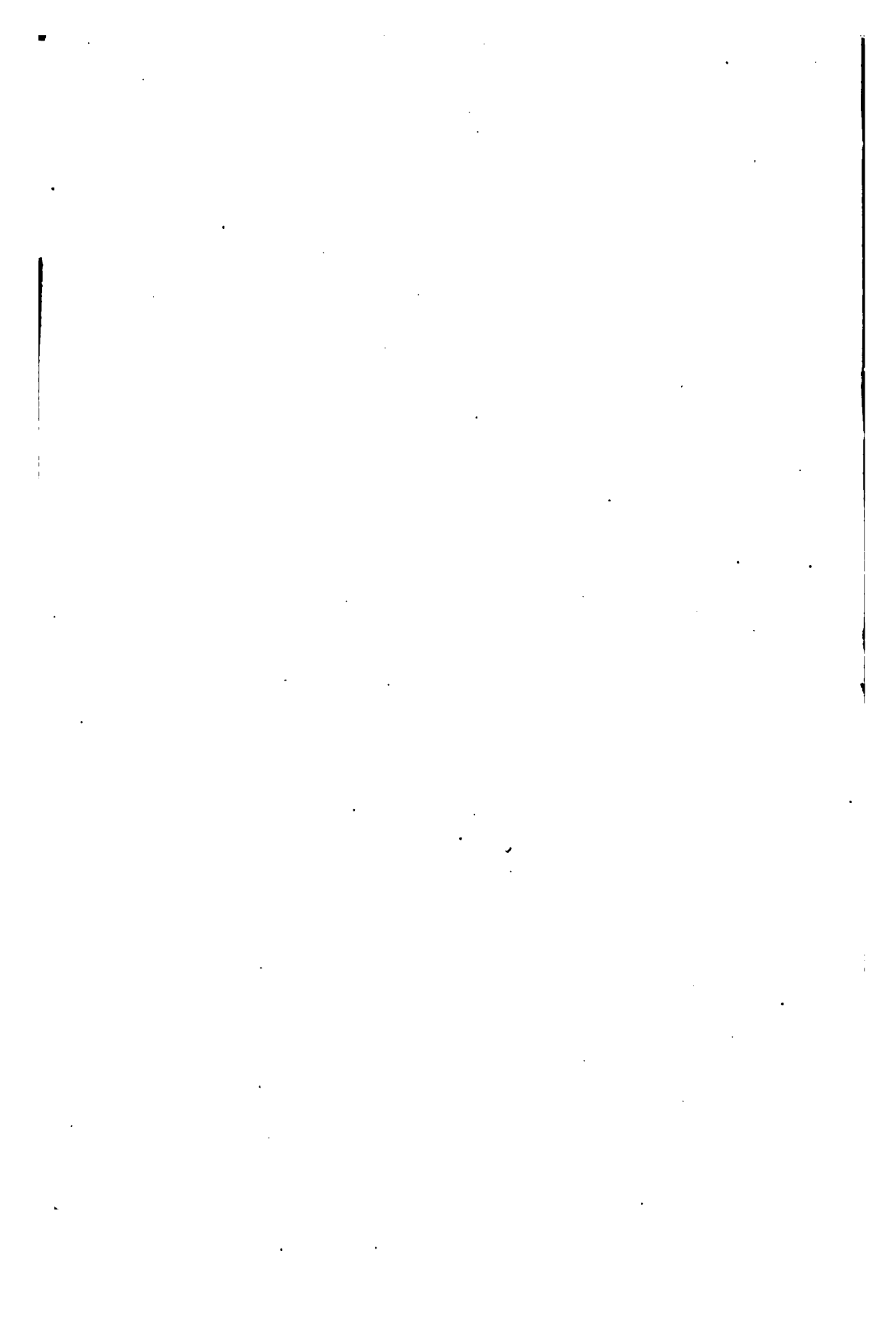
Supreme Court of the Territory of Hawaii
January 31, 1910, to December 15, 1911



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JUSTICES OF THE SUPREME COURT

OF THE

TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICES:

ALFRED STEDMAN HARTWELL,
Resigned.

ALEXANDER GEORGE MORISON ROBERTSON,
Qualified March 9, 1911.

ASSOCIATE JUSTICES:

ANTONIO PERRY,
JOHN THOMAS DE BOLT,
Qualified January 31, 1910.

ATTORNEYS-GENERAL

CHARLES REED HEMENWAY,
Resigned January 30, 1910.

ALEXANDER LINDSAY, JR.
Appointed February 1, 1910.

CIRCUIT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST CIRCUIT.

FIRST JUDGE:

JOHN T. DE BOLT,
Appointed Associate Justice Supreme Court.

HENRY E. COOPER,
Qualified March 22, 1910.

SECOND JUDGE:

WILLIAM L. WHITNEY.

THIRD JUDGE:

WILLIAM J. ROBINSON.

SECOND CIRCUIT.

SELDEN B. KINGSBURY.

THIRD CIRCUIT.

JOHN ALBERT MATTHEWMAN.

FOURTH CIRCUIT.

CHARLES F. PARSONS.

FIFTH CIRCUIT.

JACOB HARDY.

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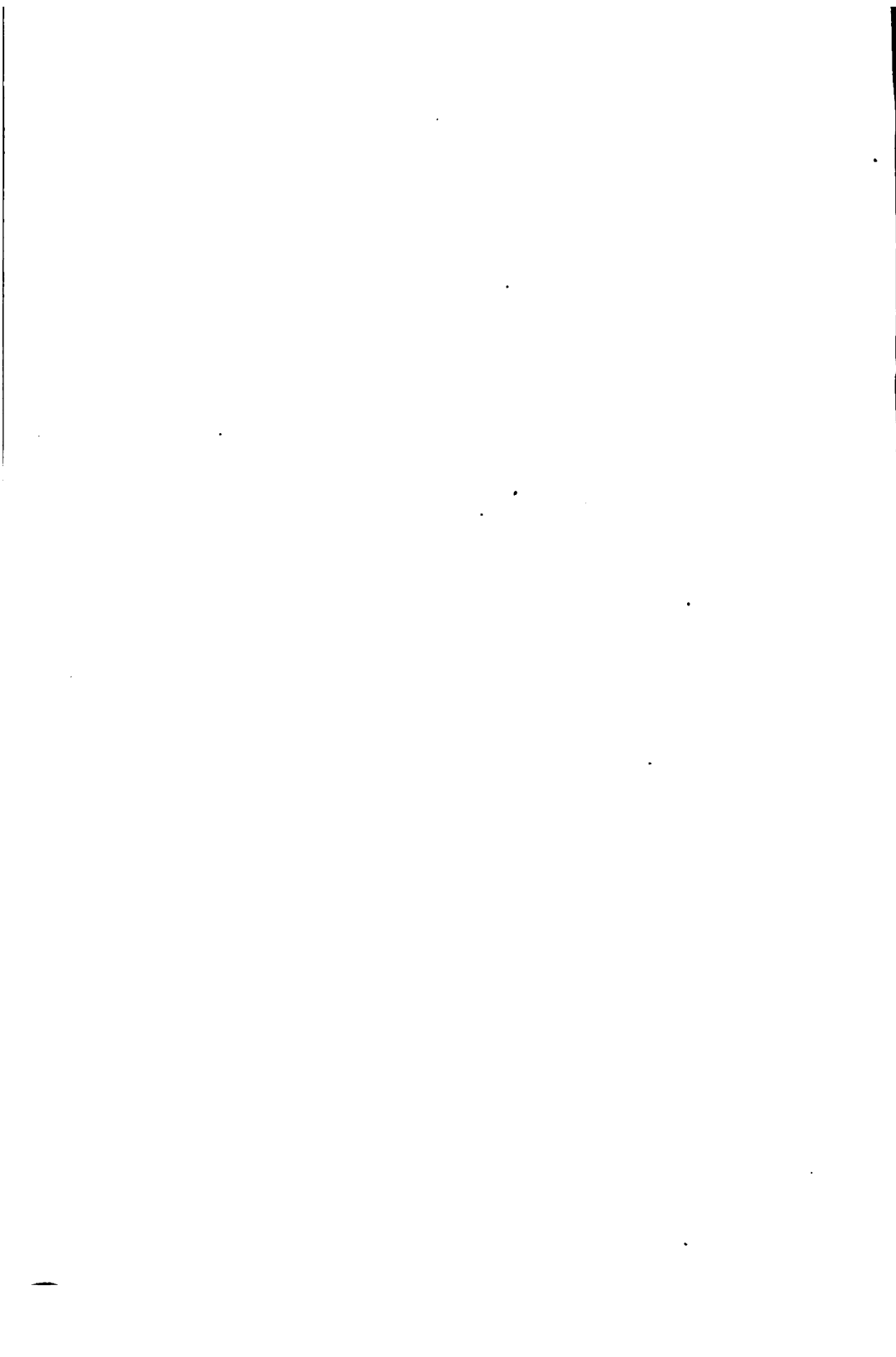
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CASES DECIDED
BY THE
SUPREME COURT
OF THE
TERRITORY OF HAWAII

TERRITORY OF HAWAII *v.* CHOY DAN.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 31, 1910.

DECIDED FEBRUARY 2, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

STATUTES—*license to sell fish.*

Under Sec. 1418G., R. L. (Act 96, Laws of 1907), a license is required for the sale of fish at a fixed place of business.

OPINION OF THE COURT BY PERRY, J.

Defendant was charged with "having at Honolulu, City and County of Honolulu, Territory of Hawaii, during one month last past, prior to and including August 30th, A. D. 1909, unlawfully and wilfully engaged in carrying on a certain business, to wit, a merchandise business, by selling fresh fish at those certain stalls numbers 11, 12 and 13 in the Honolulu Market in said City and County of Honolulu, without first obtaining a license for the carrying on of such business, he, the said Choy Dan, not being then and there a peddler of fish, fresh fruit or vegetables, contrary to the statute in such case made and pro-

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vided." He demurred on the grounds that the charge does not state facts sufficient to constitute an offense and that "Sec. 1418G of Act 96 of Session Laws of 1907 for the alleged violation of which the defendant stands charged, construed together with Sec. 1418H of said act does not require a merchandise license for the sale of fish within the Territory of Hawaii." The circuit court reserved the question whether the demurrer should be sustained.

Sec. 1418G reads: "Merchandise. The annual fee for a license to sell goods, wares and merchandise shall be \$25" (here follows a provision against the sale of opium, intoxicating liquors and other articles named and the statement of a penalty for sales of merchandise without a license.) Sec. 1418H reads: "Peddlers. The annual fee for a license to peddle merchandise shall be \$50; providing that no license be required of persons peddling fish, fresh fruit or vegetables. A license to peddle merchandise shall authorize the owner thereof to peddle in the county which is named in the license."

Defendant's contention is that Sec. 1418G is to be read as though it contained an exemption in favor of sales of fish, or, in other words, that the word merchandise was used in that section as not including fish, the argument being that the intention to make that exemption is shown by the grant of the exemption stated in Sec. 1418H and by the repeal earlier in the same session of the legislature of Sec. 1406 of the Revised Laws requiring a fee of \$10 for a license to sell salmon. Reference is also made by the defendant to the fact that the finance committee of the House based its recommendation for such repeal upon the fact that "Your committee does not approve of the imposition of a license on food stuffs confined mostly to the use of the poor" as well as upon the fact "that the amounts collected from this license are very small." In our opinion the construction thus contended for should not be adopted. The language of Sec. 1418G is clear and unambiguous. No exemption in favor of sales of fish is there stated nor does the language of the section permit of construing into it any exemption. The fact

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that the proviso was inserted in Sec. 1418H has force to our minds against the construction contended for. It shows that the legislature in passing the act appreciated that the term merchandise as used in license statutes includes fish; and yet with that knowledge it failed to express any exemption in the preceding section. Nor is the distinction between the two classes of licenses unfounded in reason. A person maintaining a fixed stand, store or other place of business for the sale of fish or other merchandise is ordinarily better able financially to pay a license fee, and legislatures ordinarily have financial ability in mind when they attempt to distribute the burdens of taxation equally. It may be, too, that the legislature desired to encourage the bringing of fish, fresh fruit and vegetables to the doors of the consumers. It is true that the fee for a license to peddle merchandise is made higher than that for a license to sell merchandise at a fixed place of business, but it may well be that in that instance the desire was to protect those having an established business who would naturally contribute more to the support of the government and who have a greater financial and other interest in the country. But even if the imposition of a greater license fee in the case of peddlers of merchandise is inconsistent with the failure to exempt sales of fish from the requirement of a fee under the earlier section, that of itself is insufficient to justify the addition of an exemption purely by construction. The same is to be said with reference to the repeal of the requirement of a fee for licenses to sell salmon.

While it is always the aim of courts to so construe statutes as to carry out the intention of the legislature, that intention in order to be given effect must be expressed in the statute or reasonably appear from the language used.

We answer that the demurrer should be overruled.

*F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney on the brief) for plaintiff.
Douthitt & Coke for defendant.*

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B. F. DILLINGHAM v. M. F. SCOTT; KONA DEVELOPMENT CO., LTD., AND F. B. McSTOCKER, GARNISHEES.

WRIT OF ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 1, 1910.

DECIDED FEBRUARY 7, 1910.

HARTWELL, C. J., PERRY, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF DE BOLT, J.

APPEAL AND ERROR—*rulings not reviewable on error.*

A ruling upon a motion, orally made at the first trial and based upon the evidence, for leave to amend the answer so as to plead the statute of limitations cannot be reviewed on a writ of error issued more than six months after entry of the judgment and subsequent to its reversal and a second trial, the rendition of a verdict and entry of a second judgment.

Id.—*amendment of answer and vacating of judgment.*

After a second verdict and judgment thereon, motion for a new trial and overruling of exceptions, it is too late to move for the first time for leave to amend the answer so as to plead the statute of limitations or to vacate the judgment on the ground that the cause of action is barred by the statute.

OPINION OF THE COURT BY PERRY, J.

This action, assumpsit for \$1100, was instituted on May 12, 1908. Defendant filed an answer of general denial on May 28, 1908. On October 26, 1908, judgment for the plaintiff for the amount sued for was entered, based upon a finding, jury waived, by Mr. Justice De Bolt, then circuit judge, after a full trial upon all of the issues presented. On December 9 following a motion for a new trial was denied. To review the judgment defendant sued out a writ of error upon which a decision was rendered by this court on April 21, 1909, reversing the judgment and ordering a new trial. At the second trial the jury on May 20, 1909, rendered a verdict for the plaintiff for the amount claimed, judgment being entered upon that verdict.

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on the day following. Early in June of 1909 defendant filed a motion for a new trial containing fourteen grounds, which motion was denied June 9. To review the second judgment and the rulings at the second trial and on the second motion for a new trial defendant's bill of exceptions was allowed June 29, 1909. These exceptions were overruled by this court on October 11. On the 18th of the same month defendant presented two motions in the circuit court, one to vacate the judgment on the ground that "the cause of action set forth in the complaint * * * is barred by the statute of limitations" and the other for leave to amend his answer so as to plead the statute of limitations. Both motions were denied and on November 17, 1909, the present writ of error was issued.

The errors assigned are the rulings at the first trial that plaintiff was not estopped to object to defendant's motion to amend the answer so as to specially plead the bar of the statute of limitations and denying that motion and the rulings subsequent to the filing of the second opinion by this court, denying the two motions above recited and holding that plaintiff was not estopped to object to each of them.

Mr. Justice De Bolt is disqualified from sitting in this matter. Aside from the fact that in defendant's brief are argued the defense of the statute of frauds, the distinction between the implied obligation of an accommodated party and an express promise to pay even though not the accommodated party and the question whether the express promise was an original or a collateral undertaking, all of which issues were to some extent involved at the first trial, the justice's rulings upon the motion for leave to amend the answer are specifically brought for review under the present writ. See *Moran v. Dillingham*, 174 U. S. 153, 157.

At the close of the plaintiff's case at the first trial defendant orally moved for leave to amend the answer so as to plead the statute of limitations, basing his motion upon the ground that

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the evidence then before the court showed that the action was barred. After argument this motion was withdrawn. It was renewed at the close of the defendant's case and denied. Both motions were oral. The ruling cannot now be reviewed on error. More than six months have elapsed since the entry of the first judgment. Upon the reversal of that judgment the case stood as though the first trial had not been had and as though the motion had not been made or ruled upon. The defendant was at liberty at or before the second trial, to the same extent that he was at the first trial, to move for leave to amend the answer.

Assuming that the rulings of the circuit court referred to in the remaining assignments of error are properly reviewable on this writ, the rulings were not erroneous. After verdict, judgment, motion for a new trial and decision on exceptions it was too late to move for leave to amend the answer. Such motion should have been made, if at all, at or before the trial. So also of the motion to vacate the judgment. No motion for leave to amend the answer was made before or during the second trial; nor was there any motion for a nonsuit or for a directed verdict on the ground that the action was barred or any request for an instruction on the subject. No evidence was excluded because of failure to plead the statute. In short no mention was made at any time during the trial of the possible defense of the statute. The motion for a new trial and, of course, the bill of exceptions were likewise silent on the subject. The defense of the statute of limitations is a personal privilege of which the party in whose favor it operates may take advantage or not as he desires. Under the circumstances of this case the defendant must be deemed to have waived it. 13 Pl. & Pr. 180. See also *Norris v. D'Herblay*, 9 Haw. 514, 566. There is no claim of newly discovered evidence on the subject. The defendant was as fully cognizant at the trial as he is now of the facts bearing on the issue. The defense was not available to the defendant

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at the time and in the manner in which he sought to present it in the circuit court. There must be an end to litigation at some time and the appropriate time has been reached in this case.

The orders denying the motions are affirmed.

Kinney, Ballou, Prosser & Anderson for plaintiff.

Defendant in person.

TERRITORY OF HAWAII *v.* FRANK ROBELLO,
FRANK PIRES, SOLOMON KEALOHIA AND MA-
FONG.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED DECEMBER 6, 1909.

DECIDED FEBRUARY 7, 1910.

CRIMINAL LAW—*counsel assisting prosecution—separate trials—change of venue.*

Unless otherwise directed by the attorney general a county attorney may consent to private counsel assisting the prosecution.

It may be proper to grant a motion for a separate trial if seasonably made by defendants having antagonistic interests.

A motion for change of venue on the ground that extensive corporate and personal interests prevent a fair and impartial trial in the circuit is properly denied, there appearing to be no abuse of discretion.

LARCENY—*evidence by recent possession untruthfully explained—verdict in part not sustained by evidence.*

Taking with felonious intent by defendants M. & K. may be inferred by recent possession untruthfully explained. There being no evidence other than hearsay of stealing by defendants R. & P. the verdict against them is not sustained.

JURY—*challenges for favor—instructions.*

Jurors in the employ of corporations controlled by the president of the ranch corporation owning the stolen property, who having friendly and even intimate relations with him desire to retain his good will, are not thereby disqualified, the judge upon their examination finding them to be "indifferent in the case." It is not error to find a juror disqualified by an opinion formed by hearing

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general talk leaving an unconscious tendency to "lean to one side" and to "weigh one side a little heavier than the other," but not a fixed opinion as it would be changed if what he heard was not true and "be subject to the evidence on both sides," nor to find that a juror has sufficient knowledge of English although unable to define such words as "impartial," "bias," "prejudice," "testimony" or "obligation."

A person representing the interests of the prosecution is allowed during the trial to sit with the prosecuting officer.

Instructions need not repeat the essential ingredients of larceny whenever "taking" or "getting possession" is mentioned if they have been already defined. The explanation given of reasonable doubt is approved. Certain comment on evidence does not justify setting aside verdict.

OPINION OF THE COURT BY HARTWELL, C. J.

The defendants were convicted of larceny in the first degree upon an indictment charging that at Kula, district of Makawao, in the Island of Maui, on March 7, 1905, they did unlawfully and feloniously steal, take and carry away certain cattle, seven in number, of the value of \$100, the property of the Haleakala Ranch Co., then and there found and not derelict. The court sentenced Robello to one year at hard labor, Pires ten months, Mafong one year at the reformatory school and suspended the sentence of Kealoha. After arraignment, when the case was called, the defendants objected to further appearance of C. W. Ashford as counsel for the prosecution on the ground that no authority authorizing him to appear had been presented, and excepted to the overruling of their objection. This was a second trial, the jury having failed to agree at the former trial in which, without objection by the defendants, Ashford was counsel for the prosecution. A stipulation was made in court between him, representing the prosecution, and counsel for defendants, that retrial be set for April 14, 1909, and on April 8, that the case be set for April 13. Other cases taking precedence this case was called April 15, when the first objection to Ashford's appearance was made.

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It is contended that *Territory v. Chong Chak Lai*, 19 Haw. 437, goes no further than to hold "that special counsel may assist in the prosecution of a criminal case with the consent of the attorney general;" that the county attorney, being a deputy of the attorney general, cannot delegate his power; that the ruling ought not to be extended to include a county attorney as authorized to allow counsel to assist, and that in the absence of any showing it cannot be inferred that as a deputy of the attorney general he was authorized to allow this to be done.

It might suffice to say that the objection would properly have been made before recognizing the appearance, but we prefer to consider that unless otherwise directed by the attorney general the county attorney's authority to give such consent is incidental to his statutory power to prosecute. In this case, as in that of *Chong Chak Lai*, the appearance of private counsel was on the statement of the city and county attorney that he was assisting the prosecution.

The exception cannot be sustained.

The defendants Robello and Pires excepted to the refusal to grant their motion for a separate trial from the other two defendants whose declarations concerning the larceny, placed in evidence at the former trial, implicated Robello and Pires, although made in their absence and therefore not evidence against them.

There is force in the exception. The affidavit in support of the motion shows that the interests of the codefendants were antagonistic and notwithstanding instructions to disregard such evidence human nature is such that no one can say that it would not affect the verdict. As held in *Rex v. Paakaula*, 3 Haw. 30, and *Rex v. Tin Ah Chin*, 1b. 90, there is no right to a separate trial in such cases, and to set aside a verdict on the ground that it was refused would require either a clear case of abuse of discretion or else a failure to move seasonably for a separate trial. The motion could have been made several days earlier,

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before the defendants were arraigned and the case set for trial. But for this delay the showing made would have required a separate trial for Robello and Pires, but in view of our conclusion that the evidence does not sustain their conviction, we do not pass upon this exception.

Exception was taken to the refusal of the defendants' motion for change of venue supported by their affidavit that the Ranch Co. through private counsel was vigorously prosecuting the case and that H. P. Baldwin, its president, was president of a large number of other corporations upon Maui, including the Hawaiian Commercial & Sugar Co., Paia Plantation, Maui Agricultural Co., and the Haiku Plantation; that the Hawaiian Commercial & Sugar Co. owned a corporation operating railroads on Maui, the Kahului railroad, and that Baldwin was a director and officer and largely interested in the Paia, Pulehu, Kaliaui, Kula, Makawao, Kailua and Kahiku plantations or sugar companies upon Maui, and through the Maui Agricultural Co., a copartnership in which seven of said corporations were partners, was largely interested in raising cattle; that he was the owner of the Honolua ranch; that upon the list of one hundred names selected as trial jurors for the year are the names of forty-one men in the employ of the various plantations, corporations or ranches in which H. P. Baldwin is interested aforesaid, and that all of them are more or less under his influence and subserve his interests, who therefore are not proper jurors in this case; that Baldwin is taking an active interest in the prosecution and that the manager of the Honolua ranch was inquiring that morning in Wailuku about the persons summoned as jurors and reported to Baldwin that they were satisfactory to said interests with the exception of one person; that owing to the former trial and discussion of it in the county the defendants cannot have a fair and impartial trial in the circuit and that their interests and defense will be greatly prejudiced by the influences of Baldwin and his numerous interests and by

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the business relations between him and his said interests and the forty-one persons selected to serve on the jury; that there were in attendance as trial jurors ten persons in the employ of said corporations and other interests.

Before acting upon the motion the court called for a counter-affidavit which was filed by County Attorney Coke and Ashford that Baldwin had not consulted or conferred with, or sent messages to either of them in reference to the prosecution, nor shown to them in any way whatever an interest in it or, so far as they knew, taken any active part or participated in any manner in the preparation of evidence or recommendation of or objection to jurors and that they were not aware of any reason why the defendants could not have a fair trial by a jury to be selected within the circuit.

The motion was addressed to the sound discretion of the court. The trial judge may well have found upon the evidence that Mr. Baldwin was not concerning himself about the case and it was impossible to say that a fair trial could not be had on Maui by reason of his large corporate interests there and the employment in other corporations than the Haleakala Ranch Co. of persons likely to be called on the jury, that fact being of itself insufficient to disqualify jurors.

There being no abuse of discretion the exception is not sustained.

The exception to the verdict on the ground that it was contrary to evidence and the weight of evidence we consider in so far as it is a claim that there was no evidence. By the decisions of this court a verdict stands if supported by the evidence and not contrary to law. Seven calves, the property of the Haleakala Ranch Co., were the subject of the larceny charged. There was evidence that on March 7, 1909, the manager of the Haleakala Ranch Co. saw one of the calves in Robello's lot which adjoins the ranch and that all of the calves were there in February. March 15 the deputy sheriff searched the lot under

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a warrant and found there the seven calves, all unbranded, valued at over \$100, their ages ranging from four to ten months. Robello said he had bought one from Pires, making no claim to the others which he said were put there by Kealoha and Mafong for pasturage although at that time that Kealoha denied putting them there; Pires said he bought three of the calves from Kealoha and Mafong for \$17 but had not paid for them, and sold one to Robello, and that the calves were put there to be pastured. The next day at the Makawao court house Robello and Pires repeated these statements and Mafong and Kealoha said they found the calves in a very poor condition upon unenclosed government land and fed them for over a year, sold three of them to Pires and put all into the Robello lot for pasturage. They afterwards made contradictory statements but there was no competent evidence that Robello or Pires stole the calves although they may have suspected that they were ranch calves and it was their duty to ascertain the fact. There was evidence that March 7, 1909, the ranch people found a cow on a portion of the ranch adjoining that on which the calves were found and that on the other side was a calf answering its calls; that they recognized the calf as belonging to the cow; that the calves were not derelict or starving in February and ranged in age from four to ten months so that they were too young to have been cared for by Mafong and Kealoha for any such length of time as they testified; that they were all in possession of the owner until the middle of February 1909, and one of them until one week prior to March 7, 1909.

The jury would have been amply justified in disbelieving entirely the explanation of their possession of the calves which was given by Mafong and Kealoha.

In *Prov. Gov't. v. Machado*, 9 Haw. 221, the felonious taking of coin by the defendant was inferred from her conduct when officers were searching her house for it, under which she

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had hidden it afterwards hiding it behind a picture in the house and again under the steps of another house, and it was held that the larceny was shown by this conduct. In *Republic v. Pahu*, 10 Haw. 74, a saddle was found in the defendant's possession, who falsely claimed that he bought it from another. The court said:

"The mere proof of possession of stolen property is not sufficient to constitute larceny, yet when accompanied by false explanations of its possession, a prima facie case is made and it should properly be submitted to the jury."

This case was approved in *Republic v. Kahoohanohano*, Ib. 97, in which the evidence of the felonious taking of a knife was that it was missing a few minutes after the defendant had left the table on which it had been placed and that when afterwards it was seen in his possession he said that he had taken it by mistake. "This evidence un rebutted would justify a verdict against the defendant." It does not appear that the calves were derelict. "It is not necessary, in respect to larceny, that it should appear whose property, other than the taker's, the thing is; it is enough that it appear that it is not the taker's, and that it does not appear to be derelict, and in case of doubt whether a thing is derelict, the presumption is that it is not so." Sec. 2955 R. L. The calves were "the subjects of larceny, though not at the time within the actual keeping or control of the owner." Sec. 2957 R. L. Moreover, taking of live domestic animals away from where they belong "with intent to appropriate the entire dominion over them" is not to be "presumed or supposed to have been in good faith." *People v. Kaatz*, 3 Parker's Cr. Cas. 141.

"A person does not lose the possession of his horses or cattle here because they may happen to be outside of his enclosures and he may not be able at any given time to lay his hands upon them. They are still in his possession, as much as though they were in his stable or pasture. Nor can it make any difference that they have gone five or ten miles from their ordinary range. The owner is as entirely ignorant of their precise position in

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the former as in the latter case; and the fact that they are branded or not with the owner's name is perfectly immaterial. It is sufficient for the person who comes across them to know that they are not his property; and if he drives them off and converts them feloniously to his own use, he is as much guilty of larceny, when he is ignorant of their true owner and their owner is ignorant of where they are, as he would be if both he and the owner had full knowledge on both these points." *State v. Martin*, 28 Mo. 530, 537.

According to the law as correctly stated in the cases above cited, upon the facts sustainable by the evidence the defendants Mafong and Kealoha committed the offense of larceny as charged.

Exceptions were separately taken to the denial of the defendants' challenges for cause of eleven of the jurors, only five of whom, however, sat at the trial, the defendants peremptorily challenging the other six.

It is unnecessary to say whether the objection was not waived in respect of the six jurors peremptorily challenged on the ground that the right of peremptory challenge had been abridged (*Burt v. Panjaud*, 99 U. S. 181), or that "the accused cannot complain if he is still tried by an impartial jury" (*Hayes v. Missouri*, 120 U. S. 68, 71), since the same objections were made to all of the eleven jurors, being that they, as employees of the Hawaiian Commercial & Sugar Co. and other corporations under Mr. H. P. Baldwin, had received favors from him and wished to retain his good will and that their relations with him and his interests disqualified them from being fair and impartial jurors. He, as defendants say, "Being a good man, a lovable man, and one who treats his employees humanely, they naturally feel kindly to him; naturally feel that they should be loyal to his interests, and naturally desire to retain his good will. Now to put men so related to him in a business way on the jury where he, either individually, or as the chief official of a corporation is prosecuting, is to place a juror in a position

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where his own personal interests are involved; and, that is not right to the defendant."

Besides the general qualifications of a juror prescribed by statute (Sec. 1770 R. L.), namely, citizenship, age, residence, voting qualifications, intelligence and ability to speak, read and write understandingly the English language, Act 5 S. L. 1905, requires that "if the court finds that the juror does not stand indifferent in the case" by reason of relationship to either party, "any interest in the cause," or by having "formed or expressed an opinion," or being "sensible of any bias or prejudice therein," another juror "shall be called in his stead."

The employment of jurors in Baldwin's corporations, their friendly and even intimate relations with him, his frequent acts of kindness to them and their desire to retain his good will do not in law disqualify them as jurors in this case, although all these facts are of more or less convincing nature in determining whether they stood "indifferent in the case," this being a fact which the trial judge is required to find upon all the evidence before him on the subject. As well stated in *Chesapeake & O. Ry. Co. v. Smith*, 103 Va. 326, 49 S. E. 487, "There are certain relations in life from which the law conclusively presumes bias, such as affinity or consanguinity within certain degrees," although he may be free from all bias, while there are other relations "upon which the law raises no presumption of bias, yet if upon his examination it appears that the juror is not impartial the law excludes him."

Juror F. A. Alexander testified in his examination that he had heard "some discussion of the case; just gossip; general talk;" that he thought he had unconsciously formed an opinion as to the guilt or innocence of the defendants from what he had heard; not a very fixed opinion but a sort of leaning that way; that he was not quite positive that he could set aside that opinion entirely and not permit it to affect his deliberations as a juror; that unconsciously he would not be as good and fair a

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juror to try the case as if he had not heard anything of it; that he does not feel that he is competent to render a verdict; that his opinion was not unqualified but a qualified one; and on cross-examination he testified: "I have at this time a slight opinion as to the guilt or innocence of the defendants; "I got that opinion from talking with people; I talked with people who lived in the neighborhood,"—just general conversation, "if the evidence shows the facts as they have been related to me I guess my opinion would remain the same as it is now; * * * I am not quite so free from prejudice or bias for or against the parties to this action as if I had never heard anything about the case; I think that unconsciously I have a tendency to lean to one side of the case in my present state of mind; I feel that way now."

The defendants then challenged the juror for bias. When the court interrogated him, he testified: "My opinion is not a fixed opinion, but it would tend to make me weigh one side a little heavier than the other. Having this impression I could not receive the evidence and give it the same weight as a juror; it depends upon the truth or falsity of what I have heard. If what I have heard is shown by the evidence to be not true I would change my opinion. If what I have heard is shown by the evidence to be not true I don't think I have a fixed opinion. * * * It would be subject to the evidence given on both sides." And in reply to the question, "If the facts should turn out as they have been related to you, the opinion which you now have would remain—you would be of the same opinion," he said, "I could not tell until that came to pass."

In many jurisdictions the juror would have been held to be disqualified but we are not in favor of treating the trial judge's findings on the subject of a juror's impartiality as erroneous unless the error is clear. "A great deal of regard is to be paid by the court to the discretion of the presiding judge" with whom it is usual "to inquire of a juror who may be objected to

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whether he has any bias which will prevent him from giving a fair verdict on the evidence." *King v. Ahlo*, 4 Haw. 301, 302. As said in the Virginia case cited, sustaining challenges for favor on slight grounds "tends to place the administration of justice in the hands of the most ignorant and least discriminating portion of the community by which the safety of the accused may be endangered and the proper administration of the laws put to hazard." There is everything in the appearance of a juror and his manner of answering questions put to him. This juror probably analyzed his mental operations with more precision than would be done by many persons and probably stated the attitude towards the case of a large portion of the community.

Queen v. Leong Man, 8 Haw. 340, held that "a juror to be impartial is not obliged to say that he will give equal credence to every witness." *Wise v. Tong Ong*, 16 Haw. 458, held that a juror was not disqualified whose acquaintance with the plaintiffs would "incline him in their favor" and "to give more credence to their testimony," but who would be "governed by the evidence." The court said (p. 461), "A juror's tone and manner would have much to do with indicating whether he had personal feeling for or against the parties, hence it is proper to leave considerable discretion to the trial judge in passing upon the qualifications of jurors in respect of bias or prejudice." In *Territory v. Johnson*, 16 Haw. 743, 753, a juror had an opinion which "would probably unconsciously influence him; he did not think he would start out with an unbiased mind," but would decide the case according to the law and the evidence. Another juror had an opinion "which it would take evidence to remove" but who would decide the case solely upon the evidence. The court said, "It is not sufficient to disqualify a juror that he has formed an opinion which it would take evidence to remove. The question is rather whether he could give the defendant a fair and impartial trial upon the law and the evidence."

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It is not merely what a juror says concerning his attitude to a case which influences the finding for he may be either oversensitive or desirous to evade sitting on the jury; it is the impression for fairness or unfairness which he makes upon the trial judge.

We are not prepared to say that the judge was in error in finding that this juror was not disqualified by bias from giving a verdict impartially after hearing the evidence.

W. A. Sparks, store manager for the Hawaiian Commercial & Sugar Co., of which he understood that Baldwin was president, said he thought neither this fact nor the fact that Baldwin was president of the Ranch Co. would influence him one way or the other and that if the evidence should be so nearly equal that he would be in doubt what the verdict should be he would not be influenced thereby. Montcastle, freight agent for the Kahului R. R. Co., and E. W. Russell, clerk in the Hawaiian Commercial & Sugar Co.'s store, who did not know who was the president of the Haleakala Ranch, were challenged for cause and objections to them being overruled they were peremptorily challenged. R. H. Anderson was peremptorily challenged after the objection to him was overruled, he having testified that his mind was free from bias or prejudice against either party. H. E. Cook, pump engineer of the Hawaiian Commercial & Sugar Co., testified that the fact that Baldwin was president of the Ranch Co. would not cause him to lean one way or the other in arriving at a verdict; that he would be perfectly free to act one way or the other; absolutely free from influence by reason of his relations with Baldwin, and would have no fear of consequences to himself whether the verdict went one way or the other. Objection to him being overruled he was peremptorily challenged. E. K. Cockett, a blacksmith for the same company, testified that he was not biased or prejudiced against the defendants; was on friendly terms with Baldwin and desired to remain so, but this would not influence him one way or the

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other if under the evidence and instructions it was doubtful what the verdict should be. Objection to him being overruled he was peremptorily challenged. Juror J. K. Taylor, a mechanic for the same company, on friendly relations with Baldwin which he desired to retain, had no bias or prejudice or fear of consequences to himself from a verdict of guilty or acquittal; would not be influenced by his relations with Baldwin or employment by him if in doubt what the verdict should be. The challenge to the juror was overruled and he sat in the case. Juror Kaalooa was objected to on the ground that he could not understandingly read, write or speak the English language and had testified that he was not friendly towards the defendants but unfriendly. The juror apparently meant by unfriendly the absence of friendship. He testified that he would give his verdict independently and do what was right. It must be admitted that he did not pass a good examination in English, not knowing the meaning of "impartial," "bias," "prejudice," or of "weight" in the expression "weight of evidence," of "testimony" or "obligation." He took and read two English newspapers; understood "common language except hard words;" learned "easy" English at school; if the testimony was in common English he thought he would be able to understand it. The court, after examining him, said, "I must state that this is a peculiar case to me. This young man seems to understand English, talks very well, reads very well, but when it comes to the meaning of common words he does not seem to understand." We think the objection to him was correctly overruled. For practical purposes one may understand the language he talks, reads and writes, and yet be unable to define or explain the meaning of the words which he uses. There are many high school graduates, to go no higher, who would not define such words as "hard," "round," "easy," "doubt," and when it comes to "reasonable doubt," "obligation," "weight of evidence," "prejudice," elaborate essays are required to define their meaning to the

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satisfaction of trained lawyers. The fact is that educated and uneducated alike often "catch on" to the sense of an alien language "understandingly" although not at home in it. There is no fixed or workable criterion of the amount and kind of knowledge of English required of jurors other than is furnished by the juror's general way of talking. All the objections to jurors, including Kuikahi who was peremptorily challenged, were correctly overruled.

The exceptions to refusal of the defendants' motion to exclude all witnesses from the court room out of hearing of the witness on the stand, including von Tempsky, manager of the ranch; to overruling objections to certain leading and suggestive questions or to strike out the evidence of the witness Morton on rebuttal on the ground that it was not rebutting evidence, are not sustained. It is the practice here to allow a person representing the interests of the prosecution to sit during the trial with the prosecuting officer. The questions were objectionable and the evidence in rebuttal does not appear to have been rebutting evidence. But these considerations are not sufficient to justify setting aside the verdict.

Before taking up the exceptions to the charge we give it in full, the instructions given at the request of the prosecution being marked in Roman numerals, those given at the defendants' request in Arabic, and instructions not requested by either side being marked alphabetically; the instructions or portions of instructions asked by defendants, which were not given, as well as the additions made thereto by the court being in parentheses.

"I. The defendants herein stand indicted for the crime of Larceny in the First Degree, in that they did, at Kula, in the District of Makawao, in the Island of Maui, within this Circuit on the 7th day of March 1909 unlawfully and feloniously steal, take and carry away certain cattle, seven in number, of the aggregate value of One Hundred (\$100.00) Dollars, said cattle being the property of the Haleakala Ranch Company, an Ha-

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waiian corporation, and that said cattle were not then and there derelict,—that is to say, had not been, and were not then abandoned by their owner.”

“II. I instruct you that larceny or theft is the felonious taking of anything of marketable, salable, assignable or available value, belonging to or being the property of another.

“Therefore, in order to convict the defendants or any of them, it must be proven to the satisfaction of the jury and beyond a reasonable doubt that such defendant or defendants did in fact knowingly and with design to steal, and appropriate the cattle in question to his or their own use and benefit, assume the corporal custody and possession of such cattle, to the exclusion of the corporal possession thereof by the owner of the cattle, and with the intent to deprive such owner of such cattle.”

“III. You are instructed that if the defendants or one or more of them obtained actual bodily possession and control of said cattle at different times shortly prior to date laid in the indictment:—that is, some of them at one such time and some of them at another such time until all seven were collected, and that they, acting jointly, were on the date alleged holding said cattle or aiding in so holding and concealing said cattle, that these defendants may be guilty as charged although you should find that the said cattle were so wrongfully taken at different times shortly prior to the date charged.”

“IV. I instruct you that the indictment charges Larceny in the First Degree, that is, the larceny of property of the value of more than Fifty (\$50.00) Dollars.

“Therefore, in order to find any one or more of the defendants guilty as charged, the Jury must be satisfied by the evidence, beyond a reasonable doubt that such one or more of defendants committed larceny of said cattle of an aggregate value of more than Fifty (\$50.00) Dollars.

“If you find that such larceny was committed by the defendants or any of them, but that the value of the cattle so stolen by them or any of them, did not exceed Fifty (\$50.00) Dollars, then you should convict such defendant or defendants as you shall believe, beyond a reasonable doubt to have committed such larceny, of Larceny in the Second Degree instead of in the First Degree as charged. To make this point still more clear, you are instructed that larceny of property up to, but

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not exceeding the value of Fifty (\$50.00) Dollars is Larceny in the Second Degree, while larceny of property exceeding Fifty (\$50.00) Dollars in value, is Larceny in the First Degree."

"V. If the Jury believe from the evidence that the cattle in question had been stolen from Haleakala Ranch Company, and were recently after being so stolen found in the possession of the defendants or of any of them, then such possession would be what the law regards as a guilty circumstance, tending, if unexplained, to prove the guilt of the defendant or defendants so having such possession, and a circumstance which, taken in connection with other testimony, is to determine the question of guilt."

"VI. You are charged that each and all of defendants may be guilty of said larceny if they all worked together to the end and for the purpose to wrongfully deprive the said owner of said property, and to convert same to their own use and benefit. In this case, one defendant may have done one act and another defendant another act and so no two of them may have done the same act and yet if they all or a part of them contributed knowingly and feloniously to the general result and proposed effect of thus obtaining said stock and depriving the owner of it, then they may all be guilty or such of them be guilty as so united in such plan, purpose and effect."

"A (VII). You are further instructed that although the four defendants are charged and prosecuted jointly under the indictment herein, yet no defendant should be convicted unless the Jury believe, from the evidence, and beyond a reasonable doubt, that such defendant is guilty of the larceny charged in the indictment, either in the first degree or in the second degree. Thus, the Jury should carefully consider and apply to each of the defendants all of the testimony which has been received. And if one or more of the defendants, less than the whole, shall in the opinion of the Jury have been proven guilty, beyond a reasonable doubt, such one or more of them should be convicted, and such one or more of them as have not, in the opinion of the Jury, been proven guilty beyond a reasonable doubt, should be acquitted."

"B (VIII). The Jury are instructed that the doubt which will entitle defendants or any of them, to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as

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you might conjure up to acquit a friend, but a doubt that you could give a reason for.

"A reasonable doubt is not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs and depending upon moral evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or not an abiding belief that defendants are guilty and if you have such belief so formed, it is your duty to convict. You should take all the testimony and all the circumstances into account and act as you have an abiding belief the fact is."

"C (IX). You are instructed that the Court gives instructions to you for the purpose of giving you the law and not for the purpose of indicating the mind or state of mind of the Court.

"With the opinion of the Court as to matters of fact, you are not concerned and should not try to discover. You are to follow the charge of the Court only as matter of law.

"The Court for example gives you the usual charges as to burden of proof, as to presumption of innocence and as to reasonable doubt, but gives these not to indicate doubt in the mind of the Court, but to guide you as to your duty, if under the evidence you yourselves have a reasonable doubt.

"The Court does not intend to convey to you the opinion of the Court as to what the evidence shows and with the opinion of the Court as to the facts you have nothing to do.

"If Counsel state their opinion, you may consider that they, in their zeal have gone too far, you may disregard their opinions, but you should carefully weigh their arguments so far as their arguments are based on the proven facts and the law as given you by the Court.

"Gentlemen, take a plain common sense view of the matter and decide as the truth of the matter appears to your own minds. Your duty is plain notwithstanding the long arguments and notwithstanding these long and complicated instructions on points of law, the application of which is in some cases doubtful.

"In fact you are free to decide the question of the guilt or

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innocence of these defendants with unfettered and unclouded minds and as you think the fact is."

"D. You are the sole judges of the weight of the evidence and of the credibility of the witnesses and if you believe from all the evidence and all the circumstances that any witness has testified knowingly falsely then you are entitled or at liberty to reject all the testimony of such untruthful witness unless it is corroborated by other proven facts and circumstances which show it probably true.

"The uncorroborated testimony of a witness who has testified falsely knowingly is of little or no weight."

"E. The credibility of the witnesses and the weight of the testimony are questions of fact for the jury.

"The Court instructs the jury, that the credibility of the witnesses is a question exclusively for the jury; and the law is, that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give credit accordingly.

"And you should take into consideration the interest in the case which the witness has, consider what temptation he may have to tell a falsehood, and consider his apparent character and candor. Uncontradicted evidence of a witness who is very much interested in the outcome of the case may be very little entitled to weigh much unless corroborated by facts, circumstances or other credible evidence."

"F. You have a plain sacred duty to perform. It is your duty to act as you think you should under the evidence and the law given by the Court, you not to be bothered or mystified by the many and long and complicated instructions given by the Court which may be not fully understood by you for the main question for you to decide is one of fact and the proven facts must in the main control your action. Do not take the opinion zealous counsel or of this Court and do not think you know what opinion the Court holds, you alone are to decide and must act by and according to your own honest firm belief."

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"G. Each must act according to his own conscience but his conscience may properly compel him to act as one of a deliberative body and so consult with each other and reason together and act as reasonable men reasoning together as to what the facts in evidence prove to a moral certainty if such proof exist in your minds. Do not fear to do your duty as you understand it. Consult together and act as you each and all believe is right.

"Heretofore you have been advised not to discuss the case with each other, but now when the case is submitted to you for your verdict I say to you discuss the matter and advise together and after full consideration act."

"No. 1. The jury are instructed the burden of proof rests upon the prosecution to prove to the satisfaction of the jury beyond reasonable doubt each and every material allegation of the indictment, and, unless that has been done, the jury should find the defendants not guilty."

"No. 2. The law presumes the defendants in this case innocent of the charge against them, and this presumption continues until the guilt of the defendants is established by the evidence beyond a reasonable doubt. This presumption of innocence is not a mere form to be disregarded by the jury at pleasure; it is an essential, substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give to the defendants in this case the full benefit of this presumption and to acquit the defendants in this case unless their guilt is established by the evidence in this case beyond a reasonable doubt."

"No 3. A reasonable doubt is that state of mind which, after a full comparison and consideration of all the evidence both for the prosecution and for the defendants, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty from the evidence in the case, that the defendants are guilty of the charge laid in the indictment. If you have such a doubt you must acquit the defendants." (The court refused to give: "If there is one single fact proven to the satisfaction of the jury by the evidence, which is inconsistent with the guilt of the defendants, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendants.")

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"No. 4. The Jury are instructed that the indictment in any case is, of itself, a mere accusation or charge against the defendant, and is not, of itself, any evidence of defendant's guilt; and no juror should, in this case, permit himself to be influenced to any extent against the defendants, or either of them, because or on account of the indictment in this case."

(Refused. "No. 5. Each individual juror must, under the obligation of his oath, find for himself, from the evidence in this case, beyond a reasonable doubt, each and every material fact alleged in the indictment before he can find the defendant guilty; and, no juror should agree to a verdict of guilty if his conscience and best opinion, based upon the evidence in the case, induces him to disbelieve the existence of any material fact alleged in said indictment, or, if upon the whole evidence, he entertains a reasonable doubt of the guilt of the defendants, notwithstanding the opinion of other jurors.")

"No. 6. Statements made by one defendant after the alleged crime, if such crime was committed, in the absence of other defendants, is not evidence against such absent defendants, and must not be considered by the jury against such absent defendants, as such statements are hearsay and not competent evidence against such absent defendants;" (adding: "But so far as such evidence explains acts taken in conjunction with all the circumstances in this case, it may be so connected with other facts in evidence as to explain generally the plan or purpose of persons who are not present.")

"No. 7. The indictment in this case charges the defendants jointly with having stolen seven head of cattle of the value of one hundred dollars the property of the Haleakala Ranch Company, and that such cattle are not derelict. I charge you that the value of said cattle being alleged in the indictment collectively, that the Territory must prove beyond a reasonable doubt that all of said cattle were, at the time of the stealing thereof, if you find that the same were stolen, were the property of the Haleakala Ranch Company, and that all of said cattle were stolen by the defendants before you can find the defendants guilty; in other words you cannot find the defendants guilty in this case unless you find that they stole all of said cattle."

"No. 8. Under the laws of this Territory 'all cattle * * * over twelve months of age, not marked or branded according

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to law, and which may have been running wild and at large for six months or over, upon any lands of this Territory, shall belong to and be the property of the owners or lessees of the lands on which the said animals may be found running.' Therefore, if you find from the evidence that the cattle mentioned in the indictment were taken by the defendants or either of them, but further find that such cattle or any of them were not marked or branded, and such cattle or any of them were over the age of twelve months, and had been running wild and at large upon any of the lands of this Territory for six months or over, when so taken, and were at the time taken upon any lands leased or owned by the defendants or either of the defendants, you must find the defendants not guilty as charged in the indictment;" (adding: "If the evidence is conflicting as to ages or as to time the cattle were at large, you are the judges as to the credibility of the witnesses and as to what facts are proven.")

"No. 9. The word derelict means abandoned or deserted. You must not only believe from the evidence in this case beyond a reasonable doubt that the cattle and all of them mentioned in the indictment are owned by the Haleakala Ranch Company, as alleged in the indictment, but you must further believe from the evidence beyond a reasonable doubt that the same had not been abandoned by such owner prior to the alleged theft of said cattle and all of them, if you find that said cattle and all of them were stolen, otherwise you must acquit the defendants."

"No. 10. Gentlemen of the Jury, you cannot find any of the defendants guilty as charged in the indictment unless you find from the evidence in this case, beyond a reasonable doubt, that such defendant or defendants took (or got possession of) all of the seven head of cattle named in the indictment from the control or care of the Haleakala Ranch Company feloniously intending at the time of taking (or getting possession of) such cattle, if same were taken (or obtained possession of,) to steal the same."

"No. 11. If you find from the evidence that the defendants, or any of the defendants took or got possession of said seven head of cattle mentioned in the indictment from the possession or control of the Haleakala Ranch Company, but further find that such defendant or defendants took the said seven head of

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cattle under the belief that he, or they, had the right so to do, it is your duty to find such defendant or defendants not guilty, although you may believe from the evidence, beyond a reasonable doubt that such defendant, or defendants, was or were mistaken as to his or their right to take such cattle;" (adding: "And you must judge of the motives of defendants from their acts and from all the proven facts of this case. The acts and circumstances speak the motive of the heart and mind.")

"No. 12. You cannot find either of the defendants guilty as charged in the indictment upon evidence showing that such defendant received such cattle after they were stolen from the Haleakala Ranch Company, if they were so stolen, unless you further find from the evidence, beyond a reasonable doubt, that such defendant participated in the original taking of such cattle and all of said cattle;" (adding: "But if some of defendants feloniously got possession of said cattle with intent to steal the same and did this under a joint plan and purpose of all or of others of defendants who also did other acts to aid in the same said acts and if you find the said cattle were so stolen by various acts of different defendants acting with one common intent and purpose in order to effect the obtaining of said cattle for their own use and benefit and to deprive the owner of the use, benefit and value of the cattle and also find that the owner was the Haleakala Ranch Company was the owner, then you must find that all so cooperating to such common end and purpose are equally guilty.")

"No. 13. Receiving stolen property, fraudulently or with knowledge at the time of receiving it that it has been stolen is a crime separate and distinct from the crime of larceny charged in the indictment in this case. Therefore, you cannot, under the indictment in this case, find any of the defendants guilty upon evidence proving or tending to prove that such defendant after the said seven head of cattle had been stolen, if same were stolen, received the same knowing that such cattle had been stolen;" (adding: "unless you also find that defendants as to all the matter acted jointly and with a common purpose to get and keep said cattle for their own benefit and to deprive the owner of the same.")

"No. 14. If you find from the evidence that the defendant, Frank Robello, did not participate in the original taking or get-

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ting possession of the said seven head of cattle, mentioned in the indictment, if same were stolen, but did receive the same from other of the defendants, you must find the defendant Frank Robello not guilty;" (adding: "unless you also find that said Robello did enter into the plan and purpose of such original taking or getting possession of said cattle, knowing the same to be taken wrongfully, feloniously and for the purpose of depriving the owner of the said cattle.")

"No. 15. If you believe from the evidence in this case that the defendant Frank M. Pires did not participate in the original taking or getting possession of the seven head of cattle mentioned in the indictment, and all of them, you must acquit him, although you may believe from the evidence that he after said cattle were taken or obtained possession of. (if same were taken,) claimed the same under purchase or bargain of sale from other of the defendants;" (adding: "and if you find he had purchased the same in good faith and had not entered into the general plan, if one there was of stealing stock if they were stolen.")

The objections urged to those portions of the charge to which exceptions, fifteen in number, were taken, may be summarized as follows: (1) Instruction III omits the essential fact that to constitute larceny wrongful possession must have been obtained with felonious intent, since the jury, separating this from the other instructions, could base a conviction thereon which would not be good in law; (2) instruction IV omits to confine the value of the property to the time of the stealing, the defendants' evidence showing that they took the calves when famishing and of little value; (3) instruction VI also omits the requirement of felonious intent of depriving the owner of property and is inapplicable to the defendants Robello and Pires, there being no evidence to connect them with the stealing; (4) instruction B seeks "to explain away the rule of reasonable doubt," allowing the jury to convict upon "an abiding belief that defendants are guilty," making the rule of reasonable doubt "a delusion and a snare;" (5) instruction C is unnecessary, draws the instructions out to great length "tending to con-

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“fuse the minds of the jurors” and discredits the instructions given by saying that their application “is in some cases doubtful,” thereby “lessening the confidence of the jury in the law as given by the court and in effect informing them to decide as they desire regardless of the instructions;” (6) instruction E warns the jury to take with great caution the evidence of the defendants, to consider their temptations to “tell falsehoods,” and seeks to discredit them; (7) instruction G urges a majority verdict and discourages independent judgment of jurors, informing them “that if they are satisfied to a moral certainty, regardless of reasonable doubt, they might find the defendants guilty.” (8) The refusal to instruct in instruction 3 that if there is a single fact proved which is inconsistent with the defendants’ guilt it is enough to raise reasonable doubt and require acquittal was as much as telling the jury to convict although it had a reasonable doubt of material facts. (9) The defendants were entitled to instruction 5 since “no juror has a right to violate his oath and his own opinion based upon the evidence and agree to a verdict because seven or more of his fellow jurymen agree to it.” (10) The addition to instruction 8 singles out a special feature unnecessarily and minimizes the instruction asked which was in accord with Sec. 422 R. L. and should have been given unmodified. Adding the words about possession left the jury to believe that receiving stolen cattle is larceny and their possession enough to show guilt. The wrong instruction was not cured by a correct one. *Territory v. Richardson*, 17 Haw. 231. (11) Modification of instruction 11 was unnecessary, repeats principles otherwise presented and allows the jury to believe that while possession in the belief of right would require acquittal yet the motives might be inferred from other evidence and justify conviction. (12) The addition to instruction 12 presumes a joint plan not shown by the evidence, and so of instructions 13, 14 and 15.

In reviewing the charge it does not seem to us that failure

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to state whenever "taking" or "getting possession" is mentioned, that it must be with felonious intent, could mislead the jury. It was held in *Sylva v. Wailuku Sugar Co.*, 19 Haw. 602, 608, that a certain instruction, if erroneous, was substantially cured by other instructions. The opinion upon rehearing of the case, *Ib.* 682, suggests "that this states the rule about conflicting instructions in broader language than can be reconciled with the ruling in *Territory v. Richardson*," 17 Haw. 231, 236. That case was a series of instructions applicable to an action for money had and received but not to an indictment for embezzlement, and as the jury was not told to treat them as modified by correct instructions afterwards given the verdict was set aside. If, however, a charge contains references to the offense which omit an essential ingredient of it but evidently refer to statements which fully define the offense in unmistakable terms then it may appear, as it does in this case, that the jury could not have been misled thereby. The court repeatedly instructed the jury upon the facts to be found to constitute larceny in language which could not be misunderstood. The "possession," mentioned in instruction III, could have been no other than was referred to in instruction II. In referring to the offense it is unnecessary always to restate its time and place. The larceny was charged to have been committed March 7, 1909, and it was unnecessary each time it was mentioned to repeat its date, or in instruction IV to say that the value of the cattle must be confined to the time of stealing. It is immaterial to Robello and Pires that instruction VI was inapplicable to them for we hold that the evidence does not justify their conviction. There is no objection to the explanation of "reasonable doubt" (*King v. Ahop*, 7 Haw. 556, 560, 561; *Republic v. Yamane*, 12 Haw. 189, 215), or to instruction C which appears to have been intended to keep the jury from accepting the judge's impression as to the defendants' guilt. Instruction 1 sufficiently covers the portion of instruction 3 refused and in-

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struction 5 is sufficiently covered by various instructions given. The addition to instruction 8 does not attach undue importance to the age of the calves. *Republic v. Ah Ping*, 10 Haw. 459, 461. The reference to possession in instruction 10 would not mislead the jury. Instruction 11 properly refers to motives. The objections in instructions 12, 13, 14 and 15 to references to a joint plan are not prejudicial to the defendants Robello and Pires and are applicable to the defendants Mafong and Kealoha.

We see nothing in the charge which is erroneously prejudicial to the defendants Mafong and Kealoha. If it contains remarks equivalent to "comment upon the character, quality, strength, weakness or credibility of any evidence," or "upon the character, attitude, appearance, motive or reliability of any witness (prohibited by Sec. 1798 R. L.), they do not justify setting aside the verdict. See *In re Notley Will*, 15 Haw. 701; *Territory v. Schilling*, 17 Haw. 264; *Brown v. Spreckels*, 18 Haw. 113.

Exceptions of Mafong and Kealoha overruled; those of defendants Robello and Pires sustained, verdict and judgments against them being set aside and vacated and as to them new trial granted.

Lorrin Andrews, Deputy Attorney General, for the Territory.

Atkinson & Quarles for defendants.

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EDWARD CAMPBELL v. H. HACKFELD & CO., LTD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 3, 1910.

DECIDED FEBRUARY 8, 1910.

HAETWELL, C.J., PERRY AND DE BOLT, JJ.

MASTER AND SERVANT—*fellow servant*.

A master owes to a servant the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work. If instead of personally performing this obligation the master engages another to do it for him he is liable for the neglect of that other, which in such case is not the neglect of the fellow servant no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. The question of liability turns rather on the character of the act than on the relations of the employees to each other.

EVIDENCE—*directed verdict*.

The evidence required submission of the case to the jury. Directed verdict set aside.

OPINION OF THE COURT BY PERRY, J.

Plaintiff claims damages for an injury received on July 6, 1902, while working in the hold of the bark *Aeolus*. At the close of the evidence for the plaintiff the presiding judge, on motion of defendant, directed the jury to render a verdict for the defendant, the ground of the direction being that the negligence relied upon was that of a fellow servant of the plaintiff and that therefore the defendant was not liable. The sole question is whether this direction was correct. At the trial the corporate capacity of the defendant was admitted. Evidence was adduced sufficient to sustain findings of fact as follows: That the plaintiff, with other stevedores had been engaged in discharging coal from the ship named and towards the end of the afternoon was sweeping coal dust in the lower hold; that the defendant was the employer of the plaintiff and the others so

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engaged; that one Capt. Dabel was the "boss" in the control of all of the work of discharging and was the sole representative of the defendant in that respect; that the main work of discharging having been completed it became necessary to remove from the lower hold to the upper deck two trucks weighing about one hundred pounds each, and that the ordinary method of removing them was by passing a rope sling through them, attaching the sling to a hook at the end of a hoisting rope and then hoisting them with steam power; that Capt. Dabel ordered the use of a rope sling for the purpose and directed one Damien, a stevedore on deck, to procure a piece of rope for the purpose; that Damien made search of the vessel but found only one piece of rope and reported to Dabel that that piece was decayed in parts and unfit for the purpose and dangerous; that Dabel thereupon directed another stevedore, Tom Pedro, to procure a rope; that Pedro also searched and found the same piece only and brought it to Dabel, likewise protesting that it was unsuitable for the purpose; that no other rope was on the ship of sufficient size and strength for the purpose desired; that the piece of rope found was in fact worn and unsound in parts and insufficient and unsafe; that Capt. Dabel well knowing the condition of the rope took it out of Tom Pedro's hands, threw it into the hold and directed one or more of the stevedores below, other than the plaintiff, to sling the trucks with it and to hook on for hoisting; that at least one of the stevedores below who was thus directed called back to Dabel protesting similarly against the use of the rope; that Capt. Dabel ordered the men to proceed with the work and to "hurry up;" that the trucks were fastened and hooked on as ordered and the hoisting done slowly and that while the trucks were being hoisted the rope broke and the trucks fell, striking the keelson, and one or more parts of one of them rebounded and struck the plaintiff and caused the injuries complained of; that the plaintiff at the moment was to one side of the hatchway and did not hear the

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call to "stand clear" if such call was given; that no such call was given; that plaintiff took no part in the attempt to remove the trucks and was wholly free from any contributory negligence in the matter; that the injuries were caused solely by the use of the unsafe rope and that there was no negligence in the method of slinging or hoisting the trucks or otherwise in the manner of the performance of the work.

"As to what is the test of a common service such as to relieve the master from liability from the injury of one servant through the negligence of another," the supreme court of the United States says that this "is also one of the vexed questions of the law and (that) perhaps there is no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land." *Railroad v. Baugh*, 149 U. S. 368, 379. It is unnecessary to consider what other courts hold on the subject. The law applicable to the case at bar has been clearly declared by the supreme court of the United States. "The general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow servants and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes as such to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties. * * * If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employes and if the employe suffer damage on account thereof the master is liable. If instead of personally performing these obligations the master engages another to do them for him he is liable for the neglect of that other which in such case is not the neglect of a fellow servant no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." *Railroad v. Peterson*, 162 U. S. 346, 353.

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In *Hough v. Railroad*, 100 U. S. 213, 219 the court quoted with approval the following statement from a Massachusetts case: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. * * * The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition."

Again in *Railroad v. Baugh*, supra, the court said: "Prima facie all who enter into the employ of a single master are engaged in a common service and are fellow servants and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. * * * He (the servant) has a right to look to the master for the discharge of that duty" (to provide reasonably safe appliances) "and if the master instead of discharging it himself sees fit to have it attended to by others that does not change the method of obligation to the employe or the latter's right to insist that reasonable

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precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty then there should be some personal wrong on the part of the employer before he is held liable therefor.

* * * And at common law whenever the master delegates to any officer, servant, agent or employe high or low the performance of any of the duties above mentioned which really devolve upon the master himself then such officer, servant, agent or employe stands in the place of the master and becomes a substitute for the master and vice principal and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence." See pp. 384, 386, 387, 388. See also *Railroad v. Moore*, 29 Kans. 452, 460, quoted with approval in *Railroad v. Baugh*; *Car Co. v. Parker*, 100 Ind. 181, 188, 189; *Benzing v. Steinway*, 101 N. Y. 547, 552, 553, and *Boyd v. Blumenthal*, 52 Atl. (Del.) 330, 331.

Within these rules there was, in our opinion, sufficient evidence to sustain a verdict for the plaintiff. If Capt. Dabel, as we think the jury would have been justified in finding from the evidence, was the superintendent of the defendant and was by it charged with the duty of furnishing to the men directly engaged in discharging and sweeping all appliances needed in the work and with knowledge of the fact furnished the unsound rope and no other, the defendant is liable for his negligence. If it can be successfully contended that the evidence was insufficient to show that Capt. Dabel was charged with that duty the case is equally bad for the defendant for upon the evidence the jury would be required to find that that duty was not delegated to an agent and that the defendant did not perform it. In

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other words, the evidence was ample to support a finding that, whether the defendant acted through Dabel or through others, it furnished on the ship no rope whatever other than the piece described by the witnesses and that was obviously unsound and unsafe. In the absence, at least, of evidence of instructions to the employes to the contrary, the duty upon the defendant was to furnish the appliances within convenient reach and furnishing elsewhere is not *prima facie* a compliance with that duty.

Cases are reported in the books where an ample supply of reasonably safe appliances had been placed within convenient reach and through the negligence of a foreman or superintendent an unsafe implement was selected and given to the laborers for use; also cases where with the good appliances furnished an unsafe one was used which was not furnished by the master. No such complications exist in the case at bar.

The case, perhaps, which most resembles this is that of *Campbell v. Gillespie Co.*, 69 N. J. L. 279, 281, 282, where a servant, directed by the superintendent to procure a certain tool selected an obviously defective one from a lot, all of which were defective, and handed it to a fellow laborer for actual use. The employer was held liable. "The duty of the master to use reasonable care to furnish proper tools to his workmen is not controverted. * * * If, therefore, it is true that the pin when furnished was imperfect and that no other pin fit for the work could be found upon the premises the defendant was chargeable with actionable negligence. * * * But if the drift pin at the time it was taken by him was unfit for use and there was not a reasonable supply of safe pins upon the premises accessible to him and from which he might have selected a good one, the master is in fault. It is true that if the defect in the pin taken was an obvious one the servant who took it, although it was the only one to be had, assumed the obvious risk of danger to himself in its use, but he cannot assume an obvious risk in such case for a fellow servant who does not know of the danger.

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As to a fellow servant, it will not be presumed that his co-servant would have selected an obviously dangerous implement when he might have chosen a good one." In the case at bar the plaintiff, there was evidence to show, had no knowledge of the defects in the rope.

The case of *Mejea v. Whitehouse*, 19 Haw. 159, does not require any ruling to the contrary. All that the court there held was that upon the facts of that particular case no duty cast by law upon the master had been violated and that the foreman who committed the act claimed to constitute negligence was a mere fellow servant and not a vice principal or representative of the master.

The verdict is set aside and a new trial ordered.

P. L. Weaver (Magoon & Weaver and C. K. Quinn with them on the brief) for plaintiff.

C. F. Clemons and C. C. Bitting (Thompson & Clemons on the brief) for defendant.

LAAHIA (w) AND KOA (k) v. WAIHOIKAEA POO-
MAIKAI AND PIONEER MILL CO., A CORPORA-
TION.

MOTIONS TO DISMISS WRIT OF ERROR.

ARGUED FEBRUARY 8, 1910.

DECIDED FEBRUARY 9, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*dismissal for lack of prosecution.*

Failure of the stenographer to furnish a transcript of the evidence does not excuse delay in filing the necessary papers on error, unless within ten days after judgment the appellant has obtained from the trial court a direction to the stenographer to prepare and furnish the transcript.

Laahia v. Poomaikai, 20 Haw. 39.

OPINION OF THE COURT BY PERRY, J.

The decision appealed from was rendered September 30, 1909, and a decree thereon entered October 19. The petition for a writ of error was filed December 9 following, and the writ issued December 23. The twenty days allowed by Rule 2 of this court for filing the necessary papers expired January 12, 1910, and on the day following the appellees moved to dismiss the writ for lack of prosecution, the record not having been sent up in obedience to the writ.

The only excuse suggested for noncompliance with the writ is the failure of the stenographer to furnish a transcript of the evidence. It is not clear from the record now before us that the appellant has at any time obtained from the trial court a direction to the stenographer to prepare and furnish the desired transcript. There are indications that such direction was obtained on or about December 29, 1909. Assuming the latter to be the fact, the order was not obtained within the time allowed by the rule and the lack of a transcript cannot, therefore, excuse the delay in sending up the record.

The appellees' motions to dismiss the writ are granted.

Vivas & Correa for plaintiffs.

Thompson, Clemons & Wilder and A. N. Kepoikai and Douthitt & Coke for the motions.

IN THE MATTER OF THE ESTATE OF ELIZABETH
IPUHAO SNIFFEN, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 8, 1910.

DECIDED FEBRUARY 9, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*extension of time.*

Under the circumstances stated in the opinion, an extension of time for the preparation and filing of appeal papers is refused.

Estate of Sniffen, 20 Haw. 40.

OPINION OF THE COURT BY PERRY, J.

The appeal in this case was taken January 11, 1910, and the time for filing in this court the appeal papers expired January 31. February 5, and not until then, appellants requested additional time for the preparation and filing of the necessary papers and the request was inadvertently granted in the belief that the twenty days had not then expired. The court of its own motion subsequently called upon the appellants to show cause why the order granting an extension of time should not be vacated.

It is unnecessary to say whether as a matter of construction of Rule 2 of this court the power exists after the expiration of the twenty days to extend the time or whether the provision as to a dismissal of the appeal for want of prosecution is mandatory or directory only. Assuming that the power exists and that the rule is directory, no satisfactory excuse for the delay has been presented and no cause shown for the extension. As conceded for the appellants the record could well have been completed within the time. Under the circumstances of the case and in the exercise of our discretion the order is vacated and extension of time refused.

Magoon & Weaver for appellants.

W. C. Achi for appellees.

CECIL BROWN, TRUSTEE UNDER DEED OF TRUST
OF AUGUST DREIER, *v.* D. L. CONKLING, TREASURER
OF THE TERRITORY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 2, 1910.

DECIDED FEBRUARY 14, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

STATUTES—*construction and constitutionality of inheritance tax law.*

Act 102, S. L., 1905, is applicable to a transfer to a trustee of corporation stock to be disposed of at the death of the grantor accord-

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ing to the terms of the trust, he retaining the whole beneficial use during his lifetime and also the power to revoke the transfer. The act is not unconstitutional by reason of discrimination or lack of uniform protection.

OPINION OF THE COURT BY HARTWELL, C. J.

This was an action of assumpsit to recover \$11,864 which had been paid by the plaintiff to the defendant under protest as an inheritance tax of two per cent. upon \$599,200, the agreed value of 2996 shares of corporate stock which on November 5, 1907, August Dreier had assigned and delivered to the plaintiff as a trustee to hold the same and pay the income thereof to him, Dreier, during his lifetime, and upon his death to pay to each of his four children the income of one-fourth or 749 of said shares and upon their death to deliver the 749 shares to the heirs of each of them with a provision that at any time after the grantor's death the trustee in his discretion might deliver the 749 shares to any of the children absolutely, the deed declaring that the grantor "hereby deposits with and delivers to the trustee for the said use and benefit of the beneficiaries aforesaid the said shares of stock," 749 shares being placed in four separate envelopes marked "For Anna Dreier Markham and her heirs at law;" "For Adele Dreier and her heirs at law;" "For August Dreier, Jr., and his heirs at law," and "For Edward Dreier and his heirs at law;" the grantor further declaring in the deed that he makes the trustee "his true and lawful attorney for the grantor and in his name to make any transfer of said stock and to do all things required to effectuate the intent of these presents," but with the proviso that during his lifetime the shares remain in his name on the books of the corporation and that he retain the right to vote the stock and exercise all rights of a stockholder at meetings and in all business affairs of the corporation and that upon any of the children dying during the grantor's lifetime without leaving issue "the gift aforesaid is to cease and determine as to the said share or

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interest of such said beneficiaries as may die and the shares of stock allotted to the said decedent are to revert to the grantor," and further that "this trust deed is revocable and the grantor reserves the right and power to at any time revoke the said instrument by will, deed or any instrument in writing, whereupon the trusts herein established shall be void and of no effect." The grantor had other property which was disposed of by will which has been admitted to probate. He died May 19, 1908, without having revoked the assignment. The tax was assessed under Act 102 S. L. 1905, Sec. 1, which provides:

"All property which shall pass by will or by the intestate laws of this Territory from any person who may die seized or possessed of the same * * * or which or an interest in or income from, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy to any property or the income thereof, shall be * * * subject to a tax * * *."

The court, jury being waived and the facts agreed upon, gave judgment for the defendant, the plaintiff excepting on the ground that it was contrary to law.

The plaintiff protested against the tax on the grounds that the transfer is not subject to it, that the act is unconstitutional in taking property without due process of law, denying equal protection of the laws, constituting double taxation, and is void for uncertainty.

The plaintiff contends that the gift was made inter vivos and took effect as such at the date of the assignment and therefore was not a transfer within the purview of the statute which, although it includes gifts which do not take effect in enjoyment or possession until after the death of the donor, nevertheless, as the plaintiff claims, is confined to property of which the decedent died seized and possessed, whether it passes by will or un-

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der the law of descents and distribution of property of persons dying intestate or by deed, grant, sale or gift. In this view the statute provides, as the plaintiff claims, that "all property which shall pass from any person who may die seized or possessed of the same or which shall be transferred by deed or gift made by one so seized or possessed in contemplation of the death of the grantor or intended to take effect in possession or enjoyment after death, shall be subject to a tax," etc. The further contention is "If this court should hold that Dreier did not have to die possessed of this property in order to subject its transfer to a tax, then we contend that the whole act is unconstitutional, and in any event that that portion of the act taxing a present transfer by deed intended to take effect in possession or enjoyment after death is unconstitutional and void for the reasons mentioned in Brown's letter of protest at the time of paying the tax." The only grounds, however, on which unconstitutionality of the act was argued are that it is "unequal and unjust in its operation" and "constitutes double taxation" since "the beneficiary is taxed on account of the trust property in his hands, not only under the property tax, but also under the income tax, and the beneficiaries are also taxed under the income tax for the income which they enjoy therefrom."

The act is not open to construction and does not by any way of looking at it, without ignoring its clearly expressed provisions, require that only such property be taxed as passes by will or descent or by transfer from one dying seized or possessed of it. The transfer made by the owner in this case, which secured to him the enjoyment of the property until his death, is strictly within the plain meaning of the act. It cannot be said that one who has the income of property does not enjoy it, although in order to dispose of it he would have to revoke its transfer and repossess himself of the muniments of title, as the stock certificates may be termed.

Coming then to the question of constitutionality. Is this a

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tax on property or on the right to take it upon the owner's death, for if a property tax in the ordinary acceptance of the term it may be open to grave constitutional objection. The tax is not levied until the owner's death, for by Sec. 5 "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent," and are to be paid by executors, administrators or trustees who are required by Sec. 7 to deduct the tax from the legacy or property for distribution, which is subject to the tax, collecting the tax upon the market value of the property. As the right to take by will or descent is derived solely from the statute a tax upon the exercise of that right is not considered to be the equivalent of taxing the property itself and therefore it may differentiate or classify according to nearness or absence of relationship of the beneficiary without involving constitutional objections to its failure to give uniform protection of law or that it takes property without due process of law. The plaintiff fully concedes this position but, as we understand his argument, claims that the right to transfer property inter vivos by deed, grant, sale or gift for any lawful purpose or consideration is a natural right which cannot be subjected to taxation on the theory of regulating the exercise of a statutory right and, under the constitutional provisions above referred to, cannot discriminate one person or class from another.

The act treats transfers of property, when so made that the beneficial rights to be derived from it remain with the transferor during his lifetime, and that the transferee or others for whom he holds the property do not have the use or disposal of it until after the death of the transferor, as the same in legal effect as they are identical in substance with testamentary acts. If the devolution of property by will is taxable when made directly and expressed in the usual terminology of last wills and testaments the same is true of dispositions of property which are made for the purpose of accomplishing the same object, namely, for testamentary purposes.

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The act then does not appear to conflict with constitutional provisions. The only case cited by the plaintiff to sustain his contention is *State v. Ferris*, 53 O. St. 314, 340, holding that the Ohio inheritance tax law was "clearly one for taxation and not for regulation as shown by its provisions and title." This conclusion appears to conflict with the United States supreme court cases relating to the federal inheritance tax law of 1898, Secs. 29, 30, Ch. 446, 30 Stat. 448, imposing an inheritance tax payable by administrators, executors and trustees "upon legacies or distributive shares arising from personal property passing from any person possessed of such property either by will or by the intestate laws of any state or territory or any personal property or interest therein transferred by deed, grant, bargain, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor." In *Eidman v. Martinez*, 184 U. S. 578, 589, it was held that this was not a tax on property but upon the succession and the same ruling was made in *United States v. Perkins*, 163 U. S. 625, 629, and *Knowlton v. Moore*, 178 U. S. 41, 59. In *Mager v. Grima*, 8 How. 490, 493, referring to a Louisiana inheritance tax, the court said: "The law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, held that the Illinois inheritance tax law does not conflict in any way with the provisions of the constitution by reason of discrimination in its exemptions from taxation or of its classification or lack of uniformity or equal protection. *Knowlton v. Moore*,

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supra, declares that "the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate." (p. 59.)

There is no double taxation here, the statute reading:

"Provided, further, that in assessing the income of any person or corporation there shall not be included the amount received from any corporation as dividends upon the stock of such corporation if the tax of two per cent. has been assessed upon the net profits of such corporation as required by this chapter, nor any bequests or inheritance otherwise taxed as such." Act 87 S. L. 1905, Sec. 4.

If one wishes to retain the benefit or use of his property while placing its custody with another under directions for its disposition upon his death, reserving the right to change the disposition so that if none is made the settlement takes the place of a will, the tax follows precisely as in case of a will.

Exceptions overruled.

A. A. Wilder (*Thompson, Clemons & Wilder* on the brief) for plaintiff.

E. W. Sutton, *Deputy Attorney General* (C. R. Hemenway, *Attorney General*, with him on the brief), for defendant.

II. HACKFELD AND COMPANY, LIMITED, A CORPORATION, v. FRANK A. MEDCALF, ADMINISTRATOR OF THE ESTATE OF JOHN KAI AKINA, DECEASED; MELE KAHANA, AND S. K. KAHANA, HER HUSBAND, D. D. ROTONO KAI AND MANOA KAI, HIS WIFE, KAHILO MEDCALF AND FRANK A. MEDCALF, HER HUSBAND, JOHN KAI JR., AND ANNIE AKAMU KAI, HIS WIFE; KAWAAUHAU AKINA, WIDOW OF J. K. AKINA JR., DECEASED; MARIA KAI, AND JOHN

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KAIU, WILLIAM KAI, AND DAVID KALUNA KAI, MINOR CHILDREN OF J. K. AKINA JR., DECEASED; AND HATTIE KAWAAUHAU AKINA, GUARDIAN OF SAID MINORS, AND FIRST BANK OF HILO, LIMITED, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED FEBRUARY 3, 1910.

DECIDED FEBRUARY 16, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

PRINCIPAL AND SURETY—*husband and wife.*

A wife may be surety for her husband and the law of suretyship requiring strict compliance with the contract on the part of the principal, applies.

A wife by signing with her husband a mortgage of her separate property to secure the husband's debt is *prima facie* surety for her husband.

OPINION OF THE COURT BY DE BOLT, J.

This is an interlocutory appeal by the defendants, Maria Kai, John Kaiu, William Kai and David Kaluna Kai, from an order of a circuit judge of the first circuit overruling their demurrer to the plaintiff's bill, the other defendants having answered. These four defendants—appellants herein—were made parties to this suit and are prosecuting this appeal as the heirs of one Malia Kekula Akina, deceased.

For the purpose of considering the demurrer, we deem the following averments of the bill pertinent and sufficient, namely:

"That on or about the 1st day of May, A. D. 1903, the said John Kai Akina, since deceased, being desirous of engaging in business on the island of Hawaii, and to secure from plaintiff the means so to do, entered into an agreement in writing with plaintiff wherein the said John Kai Akina and Malia Kekula Akina his wife, for the consideration therein partly disclosed, covenanted and agreed with plaintiff to make, execute and deliver

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to plaintiff and to its successors and assigns, a good, valid and sufficient mortgage upon certain land and premises in said writing particularly described, for the sum of \$1,000.00 and to be a continuing security for the purpose of securing from plaintiff future advances in money and in goods, wares and merchandise for said business, not to exceed the sum of \$4,000.00, the amount of said advances to be ascertained by reference to the books of said H. Hackfeld and Company, Limited; and also providing for stipulations to be in said contemplated mortgage contained—a copy of which said agreement is hereto attached, marked 'Exhibit A,' incorporated in and made a part hereof."

The agreement, ("Exhibit A"), reciting: "That whereas the said John Kai Akina, one of the parties of the first part, is about to apply for a license to sell liquor at retail in Waiohinu, Kau, Island and Territory of Hawaii, and whereas the said John Kai Akina is desirous of borrowing from the said party of the second part money in an amount sufficient to pay the cost of said license and all the expenses connected with obtaining the same; and whereas the said John Kai Akina is desirous of obtaining from said party of the second part, at market rates, all goods, wares and merchandise necessary to begin and conduct his business under said license;

"Now, therefore, for and in consideration of the mutual covenants and agreements hereinafter contained the parties of the first part agree that the said John Kai Akina shall, within one week from and after the date of this agreement apply to the Treasurer of the Territory of Hawaii for a retail liquor license as aforesaid; and if said application is granted, the said party of the second part hereby agrees to lend to said John Kai Akina, an amount sufficient to cover the cost of said license and the expenses of obtaining the same upon the following terms and conditions;

"The said John Kai Akina to apply the amount so advanced, to the payment of said cost and expenses and the said parties of the first part to make, execute and deliver to the said party of the second part and to its successors and assigns a good, valid

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and sufficient mortgage upon the following land and premises, to wit:" (Here follows the description of three pieces of land, one piece being that of Malia Kekula Akina).

"Said mortgage to be for \$1000.00 and to be a continuing security for the purpose of securing future advances in money and in goods, wares and merchandise, not to exceed the sum of \$4000.00, the amount of said advances to be ascertained by reference to the books of said H. Hackfeld & Company, Limited, said mortgage to be payable three years after its date with interest, payable quarterly, at the rate of nine per cent per annum, and to contain a provision that all rents, issues and profits arising from said property shall be payable to said H. Hackfeld & Company and applied toward the payment of said mortgage.

"And the said parties of the first part, in consideration of the foregoing, agree, upon receiving the amount required for said license, to make, execute and deliver to said H. Hackfeld & Co., Ltd. the above described mortgage.

"As witness the hands of the parties hereto, the day and year first above written.

(s.) Paul Rokono Kai (oia no J. K. Akina).

(s.) M. K. Rokono Malie Ke Kulu Akina.

Witnesses:

(s.) Wm. H. Beers."

The bill then alleges: "That in pursuance of said agreement the said John Kai Akina did enter upon and engage in said business, according to the intent of the parties, as in said writing particularly set out; and in compliance with the stipulations on its part to be performed the plaintiff, H. Hackfeld and Company, Limited, did lend money and furnish means and goods, wares and merchandise to said John Kai Akina, and did advance money to said John Kai Akina for the purposes aforesaid; and to secure the payment for which the said John Kai Akina had covenanted to execute and deliver said mortgage."

The bill shows that Malia Kekula Akina died September 26, 1904, without having executed the mortgage referred to in the agreement of May 1, 1903.

The bill also shows that on November 16, 1904, John Kai

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Akina and certain of the heirs of Malia Kai Akina, other than the appellants, executed to plaintiff a mortgage covering the lands described in the said agreement.

We also deem it proper to state that the purpose of the bill is to have this agreement of May 1, 1903, and the mortgage of November 16, 1904, construed as one instrument and decreed to be a valid and subsisting mortgage and lien upon all the lands therein described, including all the right, title and interest of the appellants therein, and that the same be foreclosed and the lands therein described sold to satisfy plaintiff's claim.

The demurrer is based upon several grounds, but the ground particularly urged, is that the bill is fatally defective in that it does not allege with sufficient certainty, if at all, any particular place on the Island of Hawaii where Akina engaged in and carried on his said business, referred to in the agreement of May 1, 1903.

In this connection it will be observed that the agreement of May 1, 1903, recites that Akina "is about to apply for a license to sell liquor at retail in Waiohinu, Kau, Island and Territory of Hawaii," and that he "is desirous of borrowing from the party of the second part money in an amount sufficient to pay the cost of said license and all the expenses connected with obtaining the same;" and that he, also, "is desirous of obtaining from said party of the second part, at market rates, all goods, wares and merchandise necessary to begin and conduct his business under said license." The bill, in this regard, alleges that Akina "being desirous of engaging in business on the Island of Hawaii," entered into this agreement, and "that in pursuance of said agreement the said John Kai Akina did enter upon and engage in said business, according to the intent of the parties, as in said writing particularly set out."

It is urged on behalf of the appellants that the debt about to be incurred at the time the agreement was signed, and which was subsequently incurred, was the debt of Akina, the hus-

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band; that the facts disclosed by the pleadings show that Mrs. Akina, the wife, signed the agreement merely as surety for her husband; that the wife's contract of suretyship was executory and conditional; that she bound herself to execute a mortgage of her land, not unconditionally, or at all events, but upon all the conditions set forth in said agreement, more particularly, on condition that her husband would apply for and obtain "a license to sell liquor at retail in Waiohinu, Kau, Island and Territory of Hawaii," and that he would there establish and carry on his said business, and not elsewhere.

Plaintiff contends that under the pleadings the wife was not a surety for her husband, at least so far as the plaintiff is concerned, and that there is equity in the bill, and, consequently, the decree appealed from should be affirmed.

Plaintiff also contends that the wife could not have been a surety, because if she were there must have been a contract, either express or implied, between her and her husband, and that under Sec. 2252, R. L., a married woman has no power to contract with her husband.

In 27 Am. & Eng. Ency. Law, 434, it is said: "A married woman may usually pledge or mortgage her separate property to secure the debt of her husband. Consequently where a wife pledges or mortgages her separate property for her husband's debt, she occupies the position of surety in respect to such mortgaged property."

While it is true, under our statute, a married woman cannot contract with her husband, there is no reason or rule of law prohibiting her from entering into a contract as surety for her husband. Indeed, the statute (Sec. 2252, R. L.), cited by counsel for plaintiff, with two exceptions only, and the contract of suretyship is not one of those, provides that "A married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole." This language is broad and comprehensive, and we think includes the contract of suretyship.

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Stewart, on Husband and Wife, at page 202, says: "In some States statutes expressly, or by necessary implication, prohibit a wife's contracts as surety for her husband. But such is not the effect of statutes forbidding contracts between husband and wife." The author cites in support of the text, *Major v. Holmes*, 124 Mass. 108, wherein the court held, under a statute, the language being identical with that of our statute, that a promissory note made by a married woman jointly with her husband, for no other consideration than a debt of his to the payee, binds her.

Stewart, supra, at page 203, also says: "Whenever a wife conveys or mortgages her property, or binds herself for her husband's debt she does so prima facie simply as his surety."

Schouler on Domestic Relations (5th ed. Sec. 95), says: "Whenever the wife joins her husband in a mortgage of her own property to secure his debts or the payment of money loaned to him, she is merely the surety of her husband, and is entitled to all the rights and privileges of a surety. This rule is well settled."

See also *Spear v. Ward*, 20 Cal. 660, 674, *Bank v. Burns*, 46 N. Y. 170, 174, 175; *Miner v. Graham*, 24 Pa. St. 491, 495; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *Allen v. O'Donald*, 28 Fed. 346; *Campion v. Whitney*, 30 Minn. 177; 21 Cyc. 1321, 1322; Jones on Mortgages, Secs. 114, 949.

Applying the rules laid down by the authorities to the facts as disclosed by the pleadings in the case at bar, it is clear that the debt contracted was the husband's and that the wife signed the agreement of May 1, 1903, merely as surety.

The further question to be considered, is whether the bill shows a compliance with the terms and conditions of the agreement of May 1, 1903. This being a contract of suretyship on the part of the wife, it was incumbent on plaintiff to set forth in the bill all essential facts showing a literal compliance with the terms and conditions upon which the wife became a surety.

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There can be no question but that a surety is entitled to stand upon the letter of his contract, and his undertaking is to be construed strictly in his favor and is not to be extended by implication or inference beyond the fair scope of its terms.

In *Miller v. Stewart*, 9 Wheat. 680, 701, Mr. Justice Story, said:

"Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient, that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

Counsel argue that the allegation in the bill that the money was loaned, the advances made and the business engaged in on the Island of Hawaii generally is sufficient; that it was not material where the business was to be carried on; that the change of location (it being admitted that the business was established in Hilo) was immaterial; that the main thing was the money loaned and advanced and the furnishing of the goods. We cannot concur in this view.

It is immaterial, as we view it, whether Hilo was a better place for Akina to engage in business than Waiohinu, or not. The wife, as the facts appear, signed the agreement as surety, and with the understanding that the business was to be carried on in Waiohinu. That was her contract. Whether she was wise in preferring Waiohinu to Hilo is not for us to decide. The bill is fatally defective in not alleging that Akina established and conducted the business provided for in the agreement, at Waiohinu.

We do not pass upon the plaintiff's right under its pleadings.

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and claimed in argument only to show that the husband and wife actually intended that she should be bound as a principal and not as a surety, for the pleadings do not contain any averment to that effect.

The order of the circuit judge overruling the demurrer is reversed and the cause is remanded.

Thompson, Clemons & Wilder for plaintiff.

C. F. Peterson and W. C. Achi for defendants.

No. 34. BENJAMIN F. DILLINGHAM v. M. F. SCOTT, KONA DEVELOPMENT COMPANY, LIMITED, AND F. B. McSTOCKER, GARNISHEES. Error to Circuit Court, First Circuit. Petition for Rehearing filed February 25, 1910. Decided February 28, 1910. Hartwell, C. J., Perry, J., and Circuit Judge Whitney in place of De Bolt, J. The petition for rehearing is based on the ground that the judgment ought to have been for the defendant upon the facts in the case which this court has said were proved, namely, that the Kona Sugar Co. was the accommodated party; that there was an original express promise of indemnity, and that of the two contracts of indemnity whereby the plaintiff was to have been held harmless (the implied obligation of the Kona Sugar Co. to pay the note and the express promise of defendant to pay the plaintiff) the plaintiff looked only to the defendant's express promise and not to the Kona Sugar Co. on its implied obligation to pay the note or reimburse the plaintiff for the money paid and expended for its use. Per curiam: The question sought to be presented upon this petition is not presented in the writ of error and not being therein assigned as error was not before the court for consideration and cannot now be considered. Petition for rehearing denied under the rules without argument.

Kinney, Ballou, Prosser & Anderson for plaintiff.

Defendant in person.

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No. 38. H. HACKFELD AND COMPANY, LIMITED, A CORPORATION, v. FRANK A. MEDCALF, ADMINISTRATOR OF THE ESTATE OF JOHN KAI AKINA, DECEASED; MELE KAHANA, AND S. K. KAHANA, HER HUSBAND, D. D. ROTONO KAI AND MANOA KAI, HIS WIFE, KAHILLO MEDCALF AND FRANK A. MEDCALF, HER HUSBAND, JOHN KAI JR., AND ANNIE AKAMU KAI, HIS WIFE; KAWAAUHAU AKINA, WIDOW OF J. K. AKINA JR., DECEASED; MARIA KAI, AND JOHN KAIU, WILLIAM KAI AND DAVID KALUNA KAI, MINOR CHILDREN OF J. K. AKINA JR., DECEASED; AND HATTIE KAWAAUHAU AKINA, GUARDIAN OF SAID MINORS, AND FIRST BANK OF HILO, LIMITED, A CORPORATION. Appeal from Circuit Judge, First Circuit. Petition for Rehearing filed February 25, 1910. Decided March 1, 1910. Hartwell, C. J., Perry and De Bolt, JJ. Per curiam: The petition discloses nothing which has been overlooked or misunderstood or which has not been carefully considered by the court. It is possible that in arguing that it was immaterial whether the license was taken out for Hilo or for Waiohinu, counsel inadvertently led the court to infer that it was taken out for Hilo, although he argued that the performance alleged was sufficient to require the inference that the license was taken out for Waiōhinu; but we were of the opinion that in this respect the bill on demurrer was bad for uncertainty. Petition denied without argument.

Thompson, Clemons & Wilder for plaintiffs.

C. F. Peterson and W. C. Achi for defendants.

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MARY N. SIMERSON v. WILLIAM KUKAILANI SIMERSON, A MINOR, BY HIS GUARDIAN, W. K. SIMERSON.

SUBMISSION ON AGREED FACTS.

ARGUED JANUARY 31, 1910.

DECIDED MARCH 2, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

DEEDS—estates—condition in restraint of alienation.

A deed conveying "absolutely" to A "and her heirs forever" reserving all rights and income for lives of grantor and wife upon condition that grantee "cannot" sell or mortgage and that after her death the land "is to descend" to her son and any after born children "and their heirs and assigns forever" gives the grantee the fee which is not reduced to a life estate by the condition against alienation.

OPINION OF THE COURT BY HARTWELL, C. J.

(Perry, J., dissenting.)

The following are the agreed facts: July 29, 1907, William Kalaehao conveyed to his daughter Mary Nanea Simerson the land situate on Nuuanu street in Honolulu, described in R. P. 3589, by deed of conveyance executed and acknowledged by himself and his wife, of which the following is a translation:

"Know all men by these presents that I, William Kalaehao, of Kapalama, Honolulu, Island of Oahu, Territory of Hawaii, for the sum of One Dollar received in my hands from Mary Nanea Simerson, of the same place, and for my affection for her, by this I acknowledge the receipt of said Dollar, therefore I do make and by this give, sell and convey absolutely unto Mary Nanea Simerson aforesaid, and her heirs forever that certain piece of land situate on Nuuanu street, Honolulu aforesaid, and being the piece of land described in Royal Patent 3589, L. C. A. 2937, and conveyed to me by deed dated December 27, 1899, and by deed dated May 27, 1905, and recorded in the Registry Office in Book 203, page 278, and in Book 272, page 106.

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"Reserving unto myself, William Kalachao aforesaid, and to my wife Kealoha Kalachao, all rights privileges and yearly receipts from the land aforesaid so long as we are alive, that is should either one of us die, then the right is to be continued to the survivor.

"This conveyance is under the conditions mentioned below, viz.:

"One. That Mary Nanea Simerson aforesaid cannot sell this land nor mortgage it;

"Two. She is to pay the mortgage existing upon the said land, and all expenses pertaining to the release of said mortgage.

"To Have and To Hold the said piece of land, with all rights and benefits thereon, to Mary Nanea Simerson aforesaid immediately after our death;

"And after her death, the said land is to descend to her child now being, William Kukailani Simerson, and other children which she may have hereafter, and to their heirs and assigns forever.

"And I, Kealoha Kalachao, the wife of William Kalachao aforesaid, for the sum of One Dollar paid by Mary Nanea Simerson, by this document release and relinquish forever all my dower in the within piece or parcel of land aforesaid to Mary Nanea Simerson aforesaid for her heirs and assigns forever.

"In Witness Whereof we have hereunto set our hands and seals this 29th day of July, A. D. 1907."

The grantor and his wife have since died. The grantee has not paid the mortgage and has no other child than William, named in the conveyance, whose guardian joins the submission. The questions submitted are (1) Did the grantee take under the deed an absolute fee simple subject to the mortgage and life estate reserved to the grantor and his wife, and (2) is the fee now in the grantee's son William subject to a life estate only in the mother, the grantee, as well as to the terms of the mortgage and rights of after born children.

The plaintiff claims that the fee is granted to her by the words of conveyance and description of the persons taking the

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land viz.: "I do make and by this give, sell and convey absolutely unto Mary Nanea Simerson aforesaid, and her heirs forever;" and that the subsequent prohibition of her selling or mortgaging the estate thus granted is void as well by the rule that later provisions in a deed are disregarded when repugnant to those which precede as because a restraint upon alienation of a fee is invalid at common law.

The defendant claims that the grantee has only a life estate with remainder in fee to the grandchild, subject to rights of after born children; that this is the clear intention of the deed, taken as a whole, and is consistent with the common law rule invoked by the plaintiff if it is law here, but that if the rule would otherwise require, then that it is not in force in Hawaii, since the court looks at the whole instrument to find its intention and gives effect to the intention when found.

There is an inconsistency which the law cannot recognize between ownership of land in fee simple and inability of the owner to sell, mortgage, lease or devise the land at will, hence restraints upon its alienation, if attempted to be made in conveying a fee, are declared to be void. This is not only on the ground of public policy that land titles shall be marketable but from the impossibility of granting to the same person at the same time two entirely distinct estates, for they can neither be created nor held by him. If one holds an estate for years or for his life and also the fee the former estates merge in the fee. As for the public policy, it is impossible to say whether the grantee's child will survive her or that other children will be born and survive her, and, if they do not, to say who would be the heirs. This shows the difficulty of making a title out of a life estate with remainder over if it were for the interest of the mother and child to sell or mortgage this land.

The plaintiff inferentially has merely a life estate if the prohibition against selling or mortgaging can be reconciled with the previous words, which in the absence of the prohibition

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would undoubtedly convey the fee. A conveyance to A and his heirs forever, provided that A shall not sell, gives A the fee although the intention of the grantor to give him a life estate only and not the fee is as clear as if fully expressed. As a matter of common sense it is not to be supposed that the grantor here intended that his daughter and her heirs should have the land forever, but that her heirs should not have it, and yet the only thing to do is either to nullify the words giving the fee or the words which restrain the alienation.

The words of grant give the grantee a fee which by the reservation of the rights, privileges and yearly receipts to the grantor and his wife takes effect upon their death. The sale of the land thus granted in fee cannot be restrained by the subsequent condition, nor is the fee reduced to a life estate because of the condition against a sale or mortgage. The habendum, if regarded as defining a life estate only, cannot defeat the estate previously granted. *New York Indians v. U. S.*, 170 U. S. 1, 20.

This result follows from the rule that effective conveyancing words of grant are not defeated by irreconcilable conditions afterwards expressed or by limitations in the habendum, and from the law that restraints upon alienation are invalid. While "courts should always seek for the actual intent of the parties and give effect to that intent when found, whatever the form of the instrument" (*Maker v. Lazell*, 83 Me. 562), this proposition "is hedged about by some positive rules of law which the parties must heed, if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title especially are guarded by positive rules of law to secure their certainty, precision and permanency. If, in the effort to ascertain the real intent of parties, one of these rules is encountered it must control, for no positive rule of law can be lawfully violated in the search for intent. * * * There is one rule pertaining to the construction of deeds, as ancient, general and rigorous as any other. It is the rule that a grantor cannot

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destroy his own grant, however much he may modify it or load it with conditions,—the rule that, having once granted an estate in his deed, no subsequent clause even in the same deed can operate to nullify it. 11 Bacon's Ab. 665. Shep. Touch. 79, 102. We do not find that this rule has ever been disregarded or even seriously questioned by courts. We find it often stated, approved, and sometimes made a rule of decision." *Ib.* 565. *Higgins v. Wasgatt*, 34 Me. 305, cited by the defendant, holds that a widow took a life estate under a deed from her son in which he "demised, granted and farm-let" to her and her husband, "their heirs, executors, administrators and assigns, to have and to hold the same for and during their natural lives," the grantor covenanting to keep the farm in repair while in his possession, and the parties for themselves and their respective heirs, executors and administrators agreeing to fulfill a certain contract, and the grantor stipulating that the grantee should have a home during her life with him. It was urged that "if lands are given in the premises to one and his heirs, habendum to him for life, the habendum is void because it is repugnant to what is already expressed in the premises," and "had the grant been in the premises to A and his heirs, habendum to him for life, the habendum would be utterly void; for an estate of inheritance is vested in him before the habendum comes; and shall not afterwards be taken away or divested by it." The court said, "Taking the whole instrument into consideration, there can be no doubt that it was the intention of the parties that Higgins and his wife should take a life estate." The case must either be regarded as overruled in the case cited from 83 Me. or else not in conflict with it. In *Redstrake v. Townsend*, 39 N. J. L. 372, the court held that the deed under discussion would "create a fee tail special at the common law," the premises being conveyed to the grantees, their heirs and assigns, habendum to the grantees "and to their heirs, male and female, the lineal

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issue of the marriage," so that "while in the premises of this deed a fee is conveyed, the habendum clause measures out but a fee tail." The statute, however, having abolished fee tails "in every form in which they might arise" the habendum was necessarily disregarded.

Another case cited by the defendant is *Bodine's Administrators v. Arthur*, 91 Ky. 53, holding that if the granting clause and the habendum are repugnant and "it appears from the whole conveyance and attendant circumstances that the grantor intended the habendum to enlarge, restrict and repugn the conveyance clause, the habendum must control," and is "to be considered as an addendum or proviso to the conveyancing clause which by a well settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." There were no words conveying the fee other than may be implied in "granted, bargained and sold." *Beecher v. Hicks*, 75 Tenn. 207, was a conveyance to the grantee, habendum unto her for her sole and separate use and to her children. The court said, "At common law the language of this deed would not have passed the fee for want of words of inheritance," and "if the habendum was repugnant to the premises either in the quantity of the thing conveyed, the estate or the grantee, it was void," but that the habendum might determine the estate granted "if the estate given was not immediate but by way of remainder," and held that the deed created a life estate, remainder to children in fee.

In *Horn v. Broyles* (Tenn.), 62 S. W. 297, a deed to the grantor's two sons declaring his intention that if either should die without issue the survivor should have the land, it was held that the latter clause did not restrict the meaning of the first and therefore did not pass the title to the survivor, the other son having died leaving issue. The court, while recognizing the general common law of conditions repugnant to a grant, approved *Beecher v. Hicks*, supra, and *Fogarty v. Stack*, 86 .

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Tenn. 610, in ruling that "The true rule is to look at the whole instrument without reference to formal divisions in order to ascertain the intention of the parties and not to permit the antique technicalities to override such intention," and that the habendum might "determine the estate granted, enlarge, explain or qualify the premises," and name a new grantee if the estate given was not immediate but by way of remainder. In *Powers v. Hibbard*, 114 Mich. 533 (72 N. W. 339), there was a deed granting the right to water power "to the extent of three runs of mill stones," and providing that "run of mill stones" was "equivalent to fifteen horse power and no more." A habendum provided for division of water power by the grantor into two classes and that none of the runs in the first class should have prior "use of water in low stages." The runs granted were of the first class. It was held that the habendum controlled, such having been the intention of the grantor, although reducing the amount of power granted in the premises. The court said that while it was undoubtedly the rule that where an estate is expressly granted a condition which destroys the grant is void as repugnant to the thing first granted and that an habendum is void if repugnant to the estate granted, yet "where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee the habendum performs the office of defining, qualifying or controlling."

This case seems to overrule *Bassett v. Buellong*, 77 Mich: 338, a case much relied upon by the defendant, in which a conveyance to the grantor's wife "her heirs and assigns forever" was held to be controlled by an habendum providing that upon her dying before her husband the premises should revert to him.

In *Prior v. Quackenbush*, 29 Ind. 475, there was a conveyance which would have passed a fee simple to the grantee but for a clause at the end that it was upon the express condition that at the grantee's death the land should forever be in B and C as the only heirs contemplated or included in the deed. It

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was held that these words were explanatory of the term "heirs" and created a life estate in the grantee with remainder in fee to B and C. The court regarded the clause as if it were in the premises rather than the habendum although it was in neither. *Clapp v. Byrnes*, 3 App. Div. (38 N. Y. Suppl. 1063), a conveyance to the grantee, "his heirs and assigns," habendum "to his and their own proper use, benefit and behoof forever," the deed reciting that there was litigation between the grantors concerning the property which they wished to end and for that purpose and for a nominal consideration that they conveyed the estate to a third person. They also covenanted to ratify the grantee's acts performed by him by virtue of the instrument, the grantee covenanting to accept the transfer for the "purposes herein expressed." It was held that the grantee did not receive the beneficial interest and that the deed at the most created a power in trust. "The instrument indicated with reasonable certainty the true character of the transaction and that there was evidently no intention to give the grantee the beneficial interest in the estate" or any interest other than "required to carry out the purposes mentioned in the deed." The statute requiring courts "to carry into effect the intent of the parties so far as such intent can be ascertained from the whole instrument and is consistent with the rules of law," the court said, "The intent, when apparent and not repugnant to any rule of law, will control the technical words for the intent and not the words is the essence of every agreement."

In *Barnett v. Barnett*, 104 Cal. 298, a conveyance to the grantee's "heirs and assigns forever" habendum for his natural life and to the issue and heirs of his body was held to give a life estate only, the court saying that at common law this would be an estate in fee tail and if the deed had been executed prior to the adoption of the civil code would have been so construed. *Flagg v. Eames*, 40 Vt. 13, was a conveyance to the grantee "and her heirs and assigns forever" habendum to the grantee and

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her heirs and assigns forever with covenants of warranty and a clause thereto annexed, "always reserving the reversion to myself and heirs as stipulated in the deed," referring to an antenuptial deed of the same date. The court said: "It is clear that in the premises or granting part of this deed the terms and description both in respect to the subject of the grant and to the estate conveyed are repugnant and contradictory," and that it was impossible not to say that the grantor's intention was to convey to the grantee an estate for her life and not an estate in fee and that this intention was plainly expressed on the face of the deed, while an antenuptial settlement contained a distinct recognition of the fact that the estate conveyed to her was only a life estate and that the terms in the deed which showed the purpose to convey a life estate were a part of the grant. "The words which are repugnant to each other are not contained in different clauses in the deed but form a part of its granting clause." *Rines v. Mansfield*, 96 Mo. 394, was a conveyance by way of indenture from the grantor and his wife conveying to the grantee "his children and assigns forever all that tract," etc., "to hold the above described premises unto the said grantee and his heirs forever." Then follows a warranty to the grantee, her children and assigns. The court held that in view of the evidence that the grantee had eight children whose names could have been inserted in the deed if they were meant to take as tenants in common with the grantee and that the habendum was to the grantee and to her heirs, the word "children" in the granting clause was used in the sense of "heirs," saying: "While the habendum clause in the deed cannot be used to defeat a grant it may be used to explain or qualify it and to define the interest granted if it has not already been granted. These cases do not conflict with the general rule.

It is evident that the common law rule is generally recognized that "In the case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that

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an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum" (2 Tiffany Law of Real Property, 870), and that "A legal estate in fee simple cannot, by the terms of its creation, be made subject to a provision that it shall not be transferred by its owner; and this is the case, whether such a provision takes the form of a condition, special limitation, or excecutory limitation, terminating the estate upon an attempted transfer, or the form merely of a prohibition of such a transfer." *Ib.* 1135.

The Hawaiian deed, of which a copy has been filed by request of court, shows that the English version appears to have been adapted to forms in English deeds. For instance, it has no formal habendum, but in place of it, immediately after the clauses marked 1 and 2 requiring that the grantee shall not sell or mortgage the land and shall pay the mortgage on it, appear the words which literally may be translated, "The land is gone (*lilo*), all the rights and the benefits upon it to said Mary Nanea Simerson immediately after our dying," and next following, "and upon her dying the land will (or shall) descend (*ili*, usually meaning go as an inheritance and translated by the parties as "descend") upon her child which she now has, W. K. S., and other children which she may have hereafter and to their heirs and assigns forever." This is not a remainder but an expression of the grantor's wish or intention that the inheritance which he had given to his daughter should descend from her to his grandchildren. There is no Hawaiian word which is the exact equivalent of "condition," the word "*kumu*," translated "conditions," used in the version, meaning "grounds" or "considerations." Moreover, the Hawaiian language does not distinguish between the imperative mood and the future tense. The deed then would readily mean to the Hawaiian mind that the grantor gives the land to his daughter absolutely and to her heirs and assigns forever, considering that she will (or shall) not sell or mortgage it and will pay off its mortgage and that at

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her death it will (or shall) descend to her children. These expressions are equally futile in their effect upon the fee granted to the plaintiff.

C. F. Peterson for plaintiff.

A. D. Larnach for defendant.

DISSENTING OPINION OF PERRY, J.

It is clear to my mind that the actual intent of the grantors, inartificially expressed, was in effect (1) to retain a life tenancy for the term of the life of the survivor of them, (2) to give Mary a life tenancy for the term of her life and (3) to give the remainder to Mary's son William and to such other children, if any, as might be born to her after the date of the deed. The general rule seems to be undoubted that in deeds as well as in other instruments the intent of the parties, when ascertained, is to be given effect unless it is in conflict with some rule of law. It is true, as stated in *Maker v. Lazell*, 83 Me. 562, that muniments of title especially are guarded by positive rules of law to secure their certainty, precision and permanency. Is there any such rule which stands in the way of giving effect to the intent of these grantors above outlined?

The rule invoked is that when in a deed the habendum is as to the quantity of the estate conveyed repugnant to the premises the former yields, this upon the theory, apparently, that what the grantor has given away in the premises he cannot in the habendum recall, and also to secure certainty in the construction of deeds. The rule is equally clear, however, that the habendum may be given effect if the premises are (a) silent as to the quantum of the estate granted, or (b) ambiguous, contradictory or uncertain in that respect. The habendum may be used in such cases to explain or qualify the premises and to define or render certain the interest granted. See, for example, *Flagg v. Eames*, 40 Vt. 13, and *Rines v. Mansfield*, 96 Mo. 394. In the discussions in the books on this subject the term

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“premises” is used as including all that precedes the habendum. While the grant in this instance, as expressed in the earlier part of the premises, is to Mary and her heirs forever, the grantors in the same breath, after reserving a life estate to themselves, say that the grant is subject to the limitation that Mary may not sell or convey, both of which are essential incidents to a fee simple. It is immaterial, of course, that these provisions are in separate sentences or even in separate paragraphs. They are to be read as though they were all in the same paragraph and sentence. The case is very much as though the grant had been of a fee simple to Mary, “provided, however, that Mary shall have only a life estate.” Reading the deed to this point only, the question may well be asked, what did the grantors mean to give to Mary, the fee, as stated in the first clause or something less than the fee—perhaps a life estate—as indicated in the later clause of the premises? Under these circumstances the habendum may, I think, be permitted to explain the language used in the premises and to remove its ambiguity. It answers clearly the question which occurs upon reading the premises. Reading it in its ordinary acceptation it shows, consistently with the preceding restrictions against sale and mortgage, that the intent was to give Mary a life estate only, with remainder to her son William subject to open and let in afterborn children. The words “e ili aku” may, under some circumstances, mean to “descend,” but in this instance they were used, I think, as meaning to “go.” As to the word “descend,” see for example, *Honolulu Investment Co. v. Rowland*, 14 Haw. 271, 272. The grantors intended a present conveyance of the remainder to William subject to open in favor of other children, and not to merely restrict the course of descent as such from Mary, the holder of the fee.

The ordinary rule that a conveyance is not good as to a person named in the habendum who is not named in the premises

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does not apply to a grant of a remainder. So also a grant is good of a remainder to one (in esse) of a class subject to open and let in others (not then in esse) of that class.

The first question should be answered in the negative and the second in the affirmative.

PATRICK WALSH v. H. L. LAWSON AND MRS. E. C. BAILEY, PARTNERS, DOING BUSINESS AS LAWSON & BAILEY.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED FEBRUARY 25, 1910.

DECIDED MARCH 2, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

ACTIONS—separate transactions.

Two actions, one for money paid by plaintiff for the use and benefit of defendants and the other for labor performed by plaintiff for defendants, may be prosecuted independently of each other, the claim on which each is based being a separate transaction.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by plaintiff on points of law from a judgment of the district magistrate of Honolulu, dismissing plaintiff's action, which was brought to recover the sum of thirteen dollars, money paid by plaintiff for the use and benefit of defendants, and at their request.

The transaction upon which the claim was based is this, as shown by the evidence: Defendants being in need of some lumber, requested plaintiff to get it for them and that they would pay for it. Plaintiff procured the lumber, as requested, and paid the bill therefor, \$13. Defendants failing to pay plaintiff, he, thereupon, brought this action.

The evidence also shows that at the time this action was be-

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gun, as well as at the time the appeal was taken, the plaintiff had another action pending in the circuit court of the first circuit against these defendants for the sum of \$888.00 for work done and labor performed, and to foreclose a mechanic's lien on the defendants' property.

To the cause pending in the district court, the defendants interposed a plea in abatement, contending that the claim of thirteen dollars should have been joined with the claim pending in the circuit court, each claim, as the defendants contended, being a part of and constituting one entire cause of action. The magistrate sustained this plea and thereupon dismissed the action. These rulings constitute the points of law upon which the appeal comes to this court.

The plaintiff contends, and the record does not disclose anything to the contrary—in fact it clearly bears out his contention—that the claim sued on in the district court was a separate and distinct cause of action from the one pending in the circuit court, and that it arose out of an entirely different and independent transaction, having no connection whatever with the other claim.

Upon the record before us there can be no other conclusion but that plaintiff is correct in his contention. The evidence is clear and conclusive that the parties did not only consider the purchase of the lumber an independent transaction but also a cash transaction.

While it is true, that the rule is well settled that an entire claim cannot be split for the purpose of bringing separate actions on different parts thereof, still, the mere fact that the plaintiff was prosecuting two actions against the defendants at the same time—one for labor performed and the other for money paid for the use and benefit of the defendants—does not even tend to show that these claims were parts of one entire transaction; nor does it follow that because the plaintiff might have prosecuted them in a single action that he should have done so.

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See *Lewers & Cooke v. Redhouse*, 14 Haw. 290; *Flaherty v. Taylor*, 35 Mo. 447; *Perry v. Dickerson*, 85 N. Y. 345; (39 Am. Rep. 663); *Phillips v. Berick*, 16 Johns. (N. Y.) 136, (8 Am. Dec. 299); *Liddell v. Chidester*, 84 Ala. 508, (5 Am. St. Rep. 387); 23 Cyc. 411, 436, 443; 1 Ency. P. & P. 148; 1 Bigelow on Estoppel, 171, 197.

The judgment of the district magistrate is reversed and the cause remanded.

U. C. Bitting (*Thompson, Clemons & Wilder* on the brief) for plaintiff.

H. G. Middleditch for defendants.

TERRITORY OF HAWAII v. Y. SOGA, Y. TASAKA,
M. NEGORO, F. K. MAKINO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 4, 5, 1910.

DECIDED MARCH 5, 1910.

HARTWELL, C.J., PERRY, J., AND CIRCUIT JUDGE WHITNEY IN
PLACE OF DE BOLT, J.

CRIMINAL LAW—conspiracy—evidence—order of proof.

The statute makes a combination or mutual undertaking or concerting together to incite acts of violence and to threaten and intimidate laborers who should not strike for higher wages or who should return to work punishable as the offense of conspiracy.

A mutual undertaking to arouse discontent of a certain class of Japanese laborers by speeches and newspaper articles tending to incite acts of violence in order to induce them to strike is shown by, or may be inferred from, the evidence in this case.

A mutual undertaking may be inferred from the conduct of the defendants, their mutual relations to each other with reference to a common object and by circumstantial evidence. The order of presenting proofs is immaterial.

The intention of newspaper articles to incite to criminal acts of violence by threats and intimidation may be inferred from their

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nature and the fact that such acts followed their publication tends to show that the language used in them was susceptible of such meaning in the minds of those whom they were intended to reach.

Incriminating evidence of papers obtained from the possession of the defendants forcibly and without process of law is admissible.

Id.—practice—instructions.

The attorney general may allow private counsel to assist prosecution.

It is not error to refuse a continuance of two days in which to plead.

Id.—constitutional—waiver by statutory authority of the full legal number of twelve jurors and consenting to withdrawal of one juror.

Such waiver is not in conflict with Art. 3 of the Constitution, the fifth and sixth amendments or Art. 83, Organic Act.

OPINION OF THE COURT BY HARTWELL, C. J.

The defendants were arrested upon the sworn complaint of the high sheriff that on January 13, 1909, in the City and County of Honolulu, they unlawfully, maliciously and fraudulently combined and mutually undertook and concerted together and with other persons whose names were to the affiant unknown "to do what plainly and directly tended to incite and occasion offense and to do what was obviously and directly injurious to another" by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations by intimidating and threatening violence against, and instigating others to intimidate and threaten violence against, and inciting and instigating assaults and batteries upon, all Japanese in the City and County of Honolulu who opposed or should oppose an immediate demand being made by the Japanese laborers upon said plantations for increase of wages and a strike by such Japanese laborers as were refused the demand and upon all Japanese in the city and county who should attempt to persuade any Japanese laborers who should be refused such demand from leaving the employment of the corporations and refusing to con-

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tinue or renew it, and by intimidation, threats of violence and instigating and inciting others to intimidate and threaten violence and by inciting and instigating assaults and batteries upon all Japanese laborers upon said plantations who should continue to work for them after being notified by the defendants and their co-conspirators to cease and refuse working (for them) and conspiring by similar means to boycott financially and ostracize socially all Japanese who should refuse to join in said unlawful, malicious and fraudulent combination or to use or assist in using or promoting the use by others of the said indirect, sinister and unlawful methods and means for carrying out the said combination and plan and thereby, at the time and place aforesaid, unlawfully, maliciously and fraudulently to prevent the said corporations from exercising their trade or business and them to impoverish contrary to the form of the statute in such case made and provided.

June 14, 1909, the defendants were taken before the first judge of the first circuit court sitting as a committing magistrate, and, demanding a jury trial, were arraigned upon the charge of conspiracy. At the defendants' request the cause was continued until the following day in order to arrange for bonds, etc. On June 19 the defendants asked that "the matter of plea be continued until Monday, June 21, and, the request being denied, objected to the proceeding on the ground that they had not been indicted, which objection was overruled. The defendants then entered a plea of not guilty and moved for a continuance until the 1910 term, which was denied. The bill of exceptions sets forth that on June 19 the defendants moved that the cause be continued for plea until June 21, 1909, and excepted to the denial of their motion. The cause was set down for trial for June 21, at which day City and County Attorney Cathcart appeared for the Territory, Messrs. Kinney, Ballou, Prosser and Anderson assisting the prosecution. The defendants objected to counsel being employed for the prose-

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cution and excepted to the overruling of their objection. On July 19 a jury was impaneled to try the cause. After the complaint was read to the jury by counsel for the prosecution and a statement made of what the prosecution expected to prove the defendants moved that they be discharged on the ground that the facts stated, if proven, would not constitute the offense charged and excepted to the denial of the motion.

After a trial occupying twenty-one days the jury rendered a verdict of "guilty of conspiracy in the third degree as charged," to which the defendants excepted as contrary to law, evidence and weight of evidence, giving notice of motion for new trial. They then moved in arrest on the grounds that the court was without jurisdiction under the fifth amendment that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" or the sixth amendment providing for trial by an impartial jury, and the third article of the constitution that "the trial of all crimes, except in cases of impeachment, shall be by jury;" or under Sec. 83 of the Organic Act that "no person shall be convicted in any criminal case except by unanimous verdict of the jury;" or under the sixth amendment that "in all criminal proceedings the accused shall enjoy the right to be informed of the nature and cause of the accusation;" or the fifth amendment that "no person shall be compelled in any criminal case to be a witness against himself;" or the fourth amendment requiring "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures;" or under the third article of the treaty with Japan that "The dwellings, manufactories, warehouses, and shops of the citizens or subjects of each of the High Contracting Parties in the territories of the other, and all premises appertaining thereto destined for the purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and prem-

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ises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for citizens or subjects of the country;" or under the fourteenth amendment that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and because evidence was improperly received and excluded; for error in certain instructions, and because the verdict was contrary to law, evidence and weight of evidence. The defendants excepted to the overruling of their motion in arrest and the court sentenced each defendant to imprisonment without hard labor in Honolulu jail for ten months and a fine of \$300 and one-fourth of the costs. The defendants then filed a motion for a new trial and excepted to its denial.

The exception to allowing private counsel to assist in the prosecution is overruled (*Territory v. Chong Chak Lai*, 19 Haw. 437; *Territory v. Robello*, ante p. 7,) together with the exceptions to refusing a continuance of the two days to plead and denying the motion to discharge the defendants on the ground that the facts stated by the prosecution in its opening remarks to the jury would not constitute the offense charged.

Before referring to the exceptions to rulings upon evidence and instructions we will consider whether the evidence which went to the jury showed that the defendants had concerted together to secure higher wages for Japanese laborers by any of the unlawful methods charged in the complaint, for if there was such evidence the exception to the verdict and refusal of new trial could not be sustained unless there was prejudicial error in the rulings during the trial, in the absence of which the verdict would stand subject only to the motion in arrest of judgment. It is unnecessary to cite the numerous decisions that in determining whether a verdict is sustained by the evidence this court does not consider the sufficiency or credibility

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of the evidence but merely its legal effect upon the question in issue, which, in this case, is whether the defendants had agreed upon the use by any of them of any of the unlawful methods for accomplishing their avowed object.

A criminal conspiracy, as defined by statute (Sec. 3091 R. L.), is "a malicious or fraudulent combination or mutual undertaking or concerting together of two or more" (1) "to commit any offense or" (2) "instigate any one thereto, or" (3) "charge any one therewith; or" (4) "to do what plainly and directly tends to excite or occasion offense, or" (5) "what is obviously and directly wrongfully injurious to another." Among the instances given in the statute is "a confederacy to commit murder, robbery, theft, burglary or any other offense provided for in the criminal code," including, among other examples, "to prevent another, by indirect and sinister means, from exercising his trade, and to impoverish him."

The charge against the defendants is sustainable by evidence that they combined or mutually undertook or concerted together to do any one or more of the things charged as the subject of their mutual undertaking, each of which is unlawful, and as it includes an undertaking to do "a wrong or injury to any person or persons or to the public" (Sec. 2703 R. L.) malice could be inferred from the nature of the contemplated wrong. Combining or mutually undertaking to do things in ways which may expose the confederates to the penalties of law is not usually done in the presence of witnesses or shown except by the conduct of the parties and by circumstantial evidence from which the mutual undertaking or combination or concerting together is inferred. *Roscoe's Crim. Ev.*, 6 Ed., 383, 385. This is so generally acknowledged to be the law upon the subject that it is needless to cite decisions to that effect.

The following facts appear or could be inferred from the evidence, namely: The defendant Negoro, after returning in May, 1908, from studies at the University of California and

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occupying himself in writing for the press, prepared in September of that year a plan for getting higher wages for those Japanese plantation laborers who worked by the month for Japanese who had planting contracts. Sheba, editor of the Japanese newspaper, the Hawaii Shinpo of Honolulu, declined to publish the article on the ground that it was an inopportune time to stir up agitation on the subject among the laborers and that it would be better to make an effort to induce the planters themselves to advance the wages of this class of labor after certain questions affecting Cuban sugar and Japanese immigration were disposed of. Negoro believed, however, that the time had come to arouse Japanese on the subject and that it was not fair that the contractors only were doing well or that those who worked for them could obtain good wages for efficiency, but that all should receive a higher monthly wage, requiring of course a higher wage for contractors as well. The object of Negoro appears to have been to arouse discontent among laborers employed by contractors and then persuade them to demand and insist upon an increase of wages. Being unable to induce Sheba to publish his article he got it published in the Nippu Jiji, a Honolulu newspaper edited by the defendant Soga, the defendants Tasaka and Negoro, according to one witness for the prosecution, although denied by them, being then or later on assistant editors.

The article, entitled "How about the Higher Wages," published in the Nippu Jiji of July 31, 1908, begins, "We regret that the wages in Hawaii are disproportionally low in comparison with the large profits," and presents an argument why the Japanese government should interpose, "for the Japanese Government is well aware that its subjects are not born to be slaves of the capitalists of Hawaii," saying: "Cane contractors (Japanese) are making profits and a large number of them are returning to Japan, thus diminishing the number of laborers." The prohibition of immigration to Hawaii," says the article,

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"Is an act silently demanding higher wages and we endorse it;" adding: "The Japanese laborers who are placed in the position of slaves by reason of the prohibition of immigration to America do not have courage to ask for higher wages;" then going on to urge that the "Japanese Government, taking great courage itself, should request the American Government to dissolve the prohibition of emigration of Hawaiian Japanese to the Mainland. The time is ripe. Though the Hawaiian immigrants do not say it in so many words, it is their hope of years and their silent prayer that they recover the lost liberty of choosing and changing their place of abode, and become a full fledged man and to be in a position to earn a just reward for their labor."

But there is evidence that Negoro's plan soon assumed a somewhat different form. He testified (p. 585 Tr.) that at the time that Sheba declined his article he himself "was not very earnest;" but a few weeks after, while in the office of the Daily Chronicle (a Japanese newspaper in Honolulu), the higher wage question was discussed, "and I think I was the proposer. I said the wages is too low and we should have higher wages for the Japanese laborers," but Tsurushima "planted himself upon the contract system" and refused to "go into the movement or urge the movement," saying that the Japanese were "very much nowadays going into independent industries," many of them raising cane on contract and beginning to permanently reside in Hawaii; that this was "a very good tendency in order to encourage the people to get into independent trade," and "raising cane by contract is a very good opening for the Japanese laborers;" and that if wages of common laborers were increased to, say, \$26, it would be more profitable than raising cane by contract and Japanese, in place of being cane contractors, would become a dependent class of laborers; therefore he opposed the higher wage movement. "I did not convince him," says Negoro, as he and also Sheba were "opposed in prin-

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ciple to the high wage movement." After the publication of the first article the "Nippu Jiji continued to publish articles advocating higher wages" (p. 591), and a controversy on the subject was "bitterly waged" between the Shinpo and Jiji. About November 1 the Jiji issued an extra calling for a conference at the Asahi theatre which "was the very first meeting of any organized effort on the part of Japanese" and "the first thing that materialized or took shape of a movement." (p. 593.) Negoro thought Tasaka wrote the notice but was not sure. "Some one of us wrote it" (p. 595); there were thirteen or fourteen present at the meeting; no laborers; small merchants and hotel keepers, and the defendants Soga, Tasaka and Negoro. (p. 596.) It was proposed at the meeting to bring about a union of the four Japanese newspapers published in Honolulu, being the Shinpo, Jiu, Jiji and Chronicle. (p. 602.) One of the objects of the meeting was to "spread the higher wage sentiment among Japanese in these Islands by and through the efforts and assistance of the newspapers." (p. 606.) The next meeting (p. 607) was at Ishi's house about November 3, called in pursuance of a resolution at the theatre meeting to get the newspaper men together, and who were present at Ishi's house as well as all of the defendants. An altercation arose between Sheba and Makino, who came in late, on the ground that the latter was not a newspaper man. (p. 614.) Makino presided and proposed a mass meeting of Japanese. (p. 46.) A week later a second meeting was held at Ishi's house at which all the defendants were present (p. 621) with the representatives of the newspapers and of the merchants' association. Nothing further was done for about two weeks "except that the daily, the Nippu Jiji, was continuing to write articles on higher wages," when, about the middle of December, a meeting was called at the Japanese Y. M. C. A. building in Honolulu "with the purpose of coming to a definite plan for pushing this question further." (p. 627.) Makino was chairman of the meet-

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ing; Negoro secretary, and all of the defendants were present. (Ev. of Harbottle p. 15). It was stated at this meeting that its purpose was "to consider the ways and method for securing higher wages for Japanese laborers on plantations" (Ib.); that the name for the organization formed that night, proposed by Negoro, was "So Kiu Kishi Kai," meaning "Higher Wage Consummation Association." After the name had been approved officers were elected (p. 86), Makino chairman; Negoro secretary, and "Yamashiro, if I remember rightly, treasurer." In Makino's speech he declared that they should get at things in "the spirit of old Japan," "yamado tomasi" (p. 14), meaning "the spirit that drives everybody away, no matter who the contestants may be. Whenever the Japanese go into a certain thing with a determined purpose of arriving—accomplishing a certain thing, they use that spirit, that yamado." (p. 27.) Negoro says that when the strike was got up, "We went there. The laborers formed higher wage associations but had no official connection with us," although "we agreed to assist it through." (p. 630). Although, as he claimed, the higher wage associations throughout the group had no official relations with each other their formation was in a way "caused by the Honolulu association." (p. 633). At the meeting at the Y. M. C. A. building the officers, Makino, Negoro and Yamashiro, were authorized to appoint a committee of twenty other members of the association, Negoro stating that the "way or method or system of securing higher wages was to be left entirely to the discretion" of the committee (p. 7); Tasaka saying, "We must do our best and in order to accomplish that purpose we must stick together" (p. 12), and Makino and Negoro urging that higher wages be secured "regardless of consequences." (p. 15).

We have referred in detail to the preliminary steps taken by the defendants for securing their avowed object for the evidence permits the finding that they combined and mutually undertook and concerted together to stir up Japanese laborers

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by appeals to their patriotism and otherwise, as will be shown hereafter, first to demand an advance in wages and then to enforce the demand by the various means and methods enumerated in the complaint which were urged in the articles published in the Jiji which was the only newspaper which joined their plan and became the avowed and generally recognized organ of the defendants in their "righteous campaign for higher wages," as Negoro terms it. (p. 643.)

The contention of the defendants is that they are not responsible for, because they are not shown to have agreed upon, any of the Jiji articles which countenance or incite violence or any unlawful acts or which are of a nature tending to intimidate those who oppose striking or wish to return to work, and they insist that their constant protest against any unlawful acts is conclusive evidence that they did not approve them or agree upon using or inciting unlawful acts.

This contention, however, cannot be sustained. Under all the circumstances which could have been found by the jury it was the duty of the defendants who deprecated the Jiji articles or did not wish to identify themselves with their publication to say so, and the inference could properly be made that although all of them may not be criminally liable for the writing and publishing of the articles they adopted and used them as part of their "campaign;" and that they did this by mutual agreement, whether expressed or implied, is immaterial. Their urging that there be no violence or breach of the peace or anything unlawful done to incur the penalty of the law may or may not have been sincere. When Mark Anthony said to his audience, "Let me not stir you up to mutiny and rage," that was precisely what he meant to do and did do. The fact is that those who "sow the wind must reap the whirlwind," no matter how fervently they may have tried to avoid it. Urging or doing unlawful things is not condoned by urging that they be done lawfully.

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There was evidence, admitted against defendants' objection, of letters addressed to Negoro by Japanese in different parts of the Territory applauding the course of the Jiji and urging violent methods for accomplishing the higher wage object. The objection made to the evidence was that it did not tend to show the defendants' agreement upon the violent courses recommended or that they had done or intended or agreed to do anything to suggest them. Evidence of serious assaults by the Japanese at Waipahu upon another Japanese and at Honouliuli was objected to also upon similar grounds. We think that the evidence was admissible in tending to show that the persons to whom the publications and speeches had been addressed or who had been reached by them were aroused thereby to urge the acts of violence and unlawful courses which they suggest.

There were papers taken from the office of the defendant Negoro without process of law and forcibly, including correspondence of the kind referred to and an outline of a plan by Negoro for a play, enacted by Japanese actors in Honolulu, which was regarded as depicting editor Sheba as a traitor and an objectionable person who ought to be exterminated. Defendants' claim that the evidence was inadmissible because illegally obtained is not sustained. *Commonwealth v. Acton*, 165 Mass. 11; *Commonwealth v. Smith*, 166 Mass. 370; *Adams v. New York*, 192 U. S. 585.

The evidence referred to, in connection with other evidence to be mentioned, permitted the inference by the jury that the defendants combined and concerted together to secure higher wages for a certain class of Japanese laborers and that in order to accomplish their common object they mutually undertook to arouse a feeling among the laborers which would induce them to strike and that as part of their mutual plan and undertaking they used the Jiji newspaper in furtherance of their common object to intimidate and threaten Japanese laborers opposed to striking as well as Japanese who tried to dissuade

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laborers from quitting work, and also that in furtherance of and as part of their common plan the defendants combined to intimidate and threaten with violence and to incite assaults and batteries upon all Japanese laborers who kept on working and that they conspired by similar means to boycott financially and ostracize socially Japanese who refused to join in such indirect, sinister and unlawful methods and means for carrying out the defendants' plan, the object of which was to prevent the said corporations from exercising their trade and to impoverish them, unless the defendants' main object of enforcing an advance in wages should sooner or otherwise be accomplished.

The jurors as reasonable men could properly have found the following facts from the evidence and drawn from those facts the inferences below stated:

(1) The early history is outlined above of the movement to secure higher wages and the formation of the Higher Wage (Consumption Association; (2) that all of the four defendants were regularly called upon by men on the Oahu plantations for speeches intended to stir up the laborers, and always responded, with one exception at a meeting at Ewa; (3) that Negoro drafted the outline of the play, which as presented was calculated to arouse bitter feeling and to incite violence against Sheba and others opposing the campaign for higher wages, and instructed the actors at rehearsal; (4) that all of the defendants were present at the production of the play and none protested against its suggestions of violence; (5) that Soga and Tasaka were admittedly editors of the Jiji; that Negoro was also an editor and that Makino knew of substantially all of the publications in the Jiji and approved of them; (6) that all of the defendants were promptly notified of the inflammatory letters received by the Jiji and yet made no attempt to inform their writers that they were misunderstanding the purport of the advice published in the Jiji; (7) that all of the defendants made speeches at Kahuku, and some of them at other places,

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encouraging expulsion of the sycophants from the plantation; (8) that the word "bokumetsu," which is capable of meaning "exterminate," was used in some of the speeches to the laborers made by or in the hearing of the other defendants; (9) that all of the defendants knew at the time that Sheba feared for his life and had a body guard, and yet made no protest against the publications in the Jiji which were susceptible of being understood as encouraging and inciting assaults upon him; (10) that at a meeting of delegates held towards the end of the campaign, at which meeting all the defendants were present, it was unanimously voted to extend thanks to Soga for his efforts in the Jiji; (11) that one of the objects of the H. W. C. A., in the formation and maintenance of which all of the four defendants were active, was (Ex. A 22) "to establish branch offices in country districts" and that the associations formed in the country districts were closely affiliated with the association in Honolulu; (12) that another object of the H. W. C. A. was (Ex. A 22) to procure "men of Sogoro (martyr) type," that is, men willing to suffer and if necessary die for the advancement of the cause, to provide as a "plan of protection of Sogoro (martyr)," "to pay money, to provide work, to bail out, and to provide lawyer," and to engage lawyers and pay their fees "to defend officers of head office and directors, to give opinions, and to defend Sogoro (martyr) of country districts" and to pay "traveling expenses of lawyer and of interpreter;" (13) that a military system of pickets, passes, etc., was inaugurated and maintained during the strike, with the knowledge and approval of all of the defendants, for the purpose of preventing strikers from returning to work and of intimidating them and others who might otherwise be willing to accept employment on the plantations; (14) that letters intended for the H. W. C. A. were ordinarily addressed in the care of the Jiji, of which some were forwarded by Soga to the officers of the association and

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some were not so forwarded, and that Makino and Negoro in advance agreed with Soga that the latter should in his discretion determine what letters to forward to them, and (15) that the Honolulu H. W. C. A. defended against all of the proceedings with reference to the strike and its incidents, except the prosecution against the assailants of Giichi of Ewa, and that Makino and Negoro were personally active in rendering assistance in the defense.

Extracts inserted here from translations of some of the Jiji articles and communications addressed to the Jiji and H. W. C. A. as received in evidence were capable of being understood by those for whom they were intended as inciting violence. So also are some of the replies to those articles and communications.

"There are in the plantations certain noxious insects called sycophants. They constantly disturb the peaceful relations of the planters and the laborers. * * * So what we desire is that you who live on the plantations should exert yourselves in getting rid of the sycophants who are to be found here and there on the plantations * * * They are enemies to our laborers, they are traitors. * * * The strikes which have occurred have been the result of the base, malicious artifices of these sycophants. This is the third reason why they should be got rid of, why they should be destroyed."

"If they" (referring to Sheba and others) "go to extremes in vexing the laborers it is sure that they will not be allowed to die natural deaths" (literally, die on the mats or in their beds), "it is said." "On the point of death the best thing they can do is to prepare to die nobly, it is said."

"The conclusion which he" (a certain speaker at a mass meeting) "reached was thus stated: The 70,000 Japanese here must ever make that which is just and right their standard of action and must exterminate (bokumetsu) those Japanese who play the role of Russian spies, who resemble the worms that are found in the bodies of lions."

"Ignorant alike of duty and responsibility,

"Are you, the turf-born beast of a planter's dog.

"Sure it is you are the foe of 70,000 Japanese.

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"Prepare to receive a shower of fists."

From "a song on the higher wage question:"

(4) "Reflect well on this, wages have not been increased up to today because of the existence of a mischievous pig and dog or pigs and dogs. * * * (7) These tame-looking, tail-wagging animals, the wild pig and the prairie dog, will fall into the hands of some hunter or other. (8) Throughout the eight islands of Hawaii there is not a single man who does not hate the dog and the pig because they prevent the rise of wages. (9) They cannot be left as they are now because when dogs and pigs are free to go where they please there is no saying when, where or whom they will bite. (10) As an ending of the affair this time, call together a few hunters and quickly slay the dog and the pig."

"The mad dog and the planter's dog" (there was evidence tending to show that these references were to Sheba) "should be beaten to death, it is said."

"As for the term Koken (planter's dog) one would like to reverse the order of the phonetic sounds and read them Kenko (knuckle bones) as the planter's dog ought to be given a dose of iron fists."

"Plantation laborers on each island, write out names of sycophants who persecute you and send it in to this office."

"It is said that the sycophants in the plantations must be expelled quickly."

"It is said that mad dog and planter's dog should be knocked to death."

"It is said that there is no fellow worth his salt who makes use of disloyal newspapers." "The rascals who do this will later on receive heavy blows, it is said."

From correspondence to the Jiji:

"But against those who oppose our action and who do not agree with our idea and purpose we must take proper steps; we must be ready for hammer of iron and shower (rain) of blood."

After referring to the Shinpo and the Chronicle, "We will never stop until we exterminate them though we risk our own life."

"We will strike the planter's dogs and pigs to the bottom of the hell at an earliest opportunity."

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"The 70,000 will strike the planter's dogs and pigs into the pond of blood and to hell."

"Let us stamp out these brutes. If we allow these creatures to remain in this society we do not know what trouble they may cause. Therefore let us take the step as soon as possible."

"Are you not awake yet, you brutes? If you oppose the Higher Wage Association we will try so that you cannot publish even a sheet of your paper. There are not only moonshining night but on dark nights take care for I will fix you until you are crippled. Do not forget."

"Oh how I wish to resort to violence. When leaders like Mr. Ishii and Mr. Negoro lead the 70,000 strong men and go forward, what can we not accomplish. These two men who are Oyama and Toga of Hawaii can rely on us and face the planters. We will work under their command with the determination to die."

Referring to Sheba and another: "On one of the vessels of the Volunteer Fleet there is a Japanese blade three feet in length clear and bright like autumn water or winter ice waiting to come down on the heads of these men. At any moment it may come—perhaps when a leading article is being written. * * * You had better prepare for the maintenance of the families you will leave behind you."

"The strikers of Aiea * * * have taken the precaution to obtain a good supply of bullets and provisions wherewith to oppose the planters."

"Now is the time to raise the fame of the land of the Rising Sun throughout the world. Let the Sun Flag be dyed with blood and let the country be strengthened by the bones of the dead."

"If any one tries to obstruct our demand for our rights we can stamp them out for our just defense. If peaceful method will not do it, though we have pity we must cut them into two with a sword."

Exceptions 4 and 5 as to the admissibility of Sheba's evidence of his own plan for raising wages as opposed to that of the defendants; 6 and 7—33 relating to the admissibility of the articles in the Jiji; 34 to the papers alleged to have been

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illegally seized; 35, 41 and 47 as to communications to the Jiji and higher wage association tending to show that the language used in the Jiji articles was accepted literally by laborers; 36 relating to papers seized in Negoro's room; 37 and 38, refusal of cross-examination of editor Sheba as to his reasons for rejecting Negoro's article, and (40, 42 and 43) as to his using similar vituperative language in the Shinpo with that of the Jiji, the defendants being allowed a certain time within which to produce the Shinpo articles; 44, allowing evidence that the defendants had not objected to the Jiji articles; 45, 46 and 49, referring to the play in which the Shinpo and Jiu are mentioned as spies and the "opposers driven out of the meeting place," connected with evidence that Sheba as a spy was so realistically presented that the audience shouted, "Fix the planter's dog" (p. 392); 50, a leading question objected to; 52, 53 and 54 as to admissibility of evidence of an assault at the Ewa plantation upon a laborer who stayed at work after the strike was declared by the higher wage association of Ewa, the constitution of which shows its official connection with the Honolulu association; 55, 56 and 57 relating to a riot and imprisonment of police officers by strikers at Waipahu; 61 as to asking Negoro on cross-examination whether "all the gamblers, loafers, thugs and criminals in jail and out of jail are on your side, are they not?" and (62) if he remembered an article in the Jiji giving as one of the rules of the higher wage association in Hana to "refuse to subscribe to the Hawaii Shinpo;" all of these exceptions are overruled for in none of them does error appear, unless in 36, 38, 42 or 63 relating to cross-examination of Sheba, but if it was error thus to restrict cross-examination it would not justify setting aside the verdict.

Exceptions not presented or argued in the brief are presumably abandoned.

Defendants' exceptions were allowed to instructions 3, 4, 5, 6, 7, 8, 9, 10a, 10d, 10e, 11, 12, 13, 14, 15, 18, 19, 20, 21a

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and 21b, but in their brief instructions 6, 9, 10a, 10d and 13 only are referred to, their objections being in substance that 6 and 9 were not predicated upon evidence; that 10a treated proof of acts done before an agreement was shown to do them; that 10d made each defendant responsible for the language and acts of the others and that 13 made acting together equivalent to conspiracy.

The following are the instructions:

"6. In order to find that the defendants conspired to prevent the corporations named, or any of them from exercising their trade and to impoverish them it is not necessary that you should find that they contemplated a complete cessation of the work of the corporations or their complete impoverishment. It is sufficient if the defendants conspired, by any of the unlawful means alleged, to prevent any of the corporations named from carrying on its business to the extent to which it otherwise would have done and to impair its income to that extent."

"9. One person has no right to threaten another with violence even in a veiled or guarded manner; all language, however veiled or guarded, which is reasonably calculated to inspire in a person of reasonable firmness and courage a fear that personal violence is going to be used by the person making use of such language is unlawful, and any conspiracy to accomplish a purpose by intimidating another by such language is contrary to law."

"10a. If you find from the evidence that the publication of intimidating and threatening articles in the Nippu Jiji constituted one of the unlawful means by which the alleged conspiracy was to be carried out, the fact that one or more of the defendants may not have been directly responsible for such publications would be no defense provided you further find that such defendants were parties to the conspiracy with those who were responsible for the publications; as when the conspiracy is once established the acts of any one conspirator in furtherance of the common design become the acts of all."

"10d. The complaint charges that the defendants, in combining to accomplish their purpose, made use of certain unlawful means, among others that of 'intimidating and threatening violence against, and instigating others to intimidate and

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threaten violence against' all Japanese who should attempt to persuade the laborers to continue to work, and against all Japanese laborers who should continue to work notwithstanding the strike."

"I instruct you, in this connection, that when a person or persons utter or publish threatening words concerning another, which, in their ordinary and common signification would amount to a threat of violence, or would instigate and incite others to intimidate and threaten violence against any person or persons, it must be presumed that the language so uttered or published was used in its ordinary sense, and so understood by those hearing or reading the same; and a defendant, when prosecuted for threatening violence, or instigating and inciting others to threaten violence against any person or persons, cannot excuse his guilty conduct by an explanation in his testimony that he did not use the words to convey the meaning thereby indicated, provided the jury believe from the evidence, beyond a reasonable doubt, that such defendant uttered or published language of this character."

"I instruct you, further, that one who employs certain language, spoken or published, which he knows will be understood by the hearer or reader as a threat of violence against any person, or as an encouragement to others to intimidate and threaten violence against any person, must be taken to have made the statement or publication in that sense. In other words, if one or more of these defendants made use of certain language, you will find that such defendant or defendants used such alleged language in the sense in which he or they knew those reading or hearing the same would take its meaning to be; and such language must be held to have been employed to express the meaning which those using the said language were aware that those reading or hearing the same would understand from it."

"13. While the law requires that, to find the defendants' guilty in this case, the evidence should show that they were acting in concert, still it is not necessary that it should be positively proved that they actually met together and agreed to do the acts charged in the complaint. Such concert of action may be proved from circumstances, and if, from the evidence, the jury believe beyond a reasonable doubt that the defendants acted together, each aiding in his own way, it would be sufficient."

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The instructions excepted to correctly state the law.

The following citations are applicable to the case: *Queen v. Most*, L. R. 7 Q. B. 253, as to a newspaper article "naturally and reasonably intended to incite and encourage or to endeavor to persuade persons who should read that article" to commit crime; *Loewe v. Lawler*, 208 U. S. 274, illegality of boycott, and as to same and also picketing see *Beck v. Teamsters' Protective Union*, 118 Mich. 497, 518, 520; so *State v. Stewart*, 59 Vt. 273, and *State v. Ryan*, 82 Pac. (Or.) 705; 3 Wigmore's Ev. Sec. 1073 as to effect of unexplained possession of letters, and see cases cited in n. 2 Ib.; Wright on Crim. Conspiracies, Am. Cases, 212, as to circumstances which imply an agreement.

The exception to the denial of the motion in arrest of judgment, which in the regular order of pleading would follow the motion for a new trial, is now to be considered.

During the trial a juror was withdrawn by consent of the defendants and of the prosecution, the trial was continued and a verdict rendered by eleven jurors. The exception to the denial of the motion in arrest of judgment presents the question whether this was allowable under Art. 3 of the constitution, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," or the fifth amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (indictments being triable by common law juries only), or the sixth amendment, "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," or under Sec. 83 of the Organic Act, "No person shall be convicted in any criminal case except by unanimous verdict of the jury."

The defendants contend that they are charged in the complaint with conspiracy in the first degree since the acts of

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violence and assaults and batteries which they are charged with having conspired to instigate may include felonies, to instigate which is by statute, Sec. 3099 R. L., a conspiracy in the first degree punishable by imprisonment at hard labor not more than ten years or by fine not exceeding \$1000; hence, as they claim, an indictment was requisite under the fifth amendment requiring a trial by a common law jury of twelve jurors. But if an indictment had been presented describing the offense as it is described in the complaint a sentence for conspiracy in the first degree could not have been imposed since the essential elements of the offense are not set forth with certainty and particularly, and by Sec. 3101 R. L., "Conspiracy not appearing to be in the first or second degree, is in the third degree, and shall be punished by imprisonment at hard labor not exceeding one year and by fine not exceeding four hundred dollars." A felony is defined in Sec. 2702 R. L., as "An offense that is punishable with death or with imprisonment for a longer period than one year," and "Every offense not a felony is a misdemeanor." *Ib.* The complaint does not charge a statutory felony punishable by imprisonment for more than one year unless the authorized sentence of one year's imprisonment and \$500 fine is to be regarded as imprisonment for more than one year because of the statutory requirement, Secs. 2887 and 2888 R. L., as amended by Act 33 S. L. 1905, that in case of nonpayment of fine and costs the convicted person "shall be committed to prison there to remain at hard labor or otherwise in the discretion of the court or magistrate until such judgment is satisfied," which is followed by a provision that hard labor shall not be imposed in misdemeanors and that after imprisonment for one year any person convicted may be discharged by order of any circuit judge by proof that he has not since his conviction had any estate out of which he should have satisfied such judgment, and with a further proviso "that such imprisonment, together with any other imprisonment that may

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have been imposed by the same sentence, shall not in any case of misdemeanor extend beyond the term of one year," and that the time of such additional imprisonment shall be deemed to discharge the fine and costs at the rate of \$1 a day.

We are of the opinion that the statutory definition of a felony refers solely to the imprisonment which may be imposed by the court and not to the imprisonment resulting in cases of non-payment of fine and costs. The case therefore did not require indictment as the offense charged is neither a statutory nor a common law felony, nor is it an infamous offense either in its nature or by reason of the kind of punishment which may be imposed. In *Callan v. Wilson*, 127 U. S. 540, a conspiracy to boycott was held to be a serious misdemeanor requiring a trial by jury in the first instance and not on appeal only. In that case there was no statute authorizing the waiver of a jury. Unlike the case at bar, the defendant demanded and was refused a jury trial in the first instance. Whether at the trial of such a misdemeanor a juror can under the third article or sixth amendment be withdrawn by consent of the accused, is a question which was fully considered in the leading case of *Commonwealth v. Dailey*, 12 Cush. 80, in which it was held that a waiver of jury to that extent was not in conflict with constitutional provisions, Chief Justice Shaw saying: "The precise question presented to us in this case is, whether a party on trial, charged with a misdemeanor, when a juror was necessarily withdrawn during the trial, and by the consent and request of counsel on the part both of the commonwealth and the accused, it was proposed and consented to, that the trial should proceed with eleven jurors, a judgment can be rendered on the verdict," and concluded as follows: "Under the circumstances of the case, the court are of opinion, that on the trial of a conspiracy, supposing it an irregularity to take the verdict of eleven jurors without the consent of both parties, yet as it did not affect the jurisdiction of the court, the exception was one

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that the accused might waive; that having stipulated of record, that he would take no exception to such irregularity, he is now precluded from taking it, and therefore that the verdict must stand." (p. 84.)

In *Thompson v. Utah*, 170 U. S., 343, the defendant, who had been indicted for grand larceny and convicted by a jury of twelve persons while Utah was a Territory, obtained a new trial which was not heard until after Utah became a State. At the second trial the defendant was again found guilty, the jury in accordance with the constitution of the State of Utah consisting of eight jurors. He moved for a new trial upon the ground among others that the jury was composed of only eight jurors, whereas the law at the time of the commission of the alleged offense required a jury of twelve persons. The supreme court (p. 349), assuming "that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories," held (p. 353), "The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons," and "in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

In *Schick v. U. S.*, 195 U. S. 65, the defendant was charged by information with having purchased and received for sale certain oleomargarin which had not been stamped according to law, waived jury and agreed to submit the issue to the court, pleading not guilty. The defendant claimed that the Olcomargarin Act was not constitutional. The court found him guilty and sentenced him to a fine of \$50 and costs, saying, "When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which

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he is given the right to enjoy. Authorities in the state courts are in harmony with this thought," and this although Mr. Justice Harlin in his dissenting opinion insisted that the requirement that all crimes shall be tried by jury furnishes an inflexible rule that may not be ignored in cases of felony and disregarded altogether in a trial for a misdemeanor even though the defendant consents to be tried by the court without a jury.

The decision in *Commonwealth v. Dailey*, 12 Cush. 80, was followed in several well considered cases. *State v. Sackett*, 39 Minn. 69; *State v. Wells*, 69 Kan. 792; *State v. Kaufman*, 51 Ia. 578. Our statute, Sec. 2820 R. L., provides that "The defendant in any criminal case less than felony may with consent of the court waive the right to a trial by jury," and that upon such waiver the case "may be tried by the court without a jury." If the entire jury may be waived in the trial of a misdemeanor it would seem to follow that the defendants could waive the legal number of jurors by consent of the court and that in such case the remaining jurors and not the court could continue with the trial and render a verdict.

The circuit court had jurisdiction of this offense. The defendants, although entitled to a trial by the full legal number of jurors, were impliedly authorized by statute to consent to the withdrawal of a juror and were not thereby deprived of their right, thus voluntarily waived, of trial by a common law jury. As to the publicity of trial and right of the public to have such cases tried by jury before tribunals established by law, there is no difficulty presented by the course which was taken. We think that the law laid down in *Commonwealth v. Dailey*, supra, applies in this case and that the defendants have been deprived of no constitutional rights. It follows that they also have not been deprived of treaty rights or of the right to equal protection of the law under the fourteenth amendment.

Exceptions overruled.

S. M. Ballou (Kinney, Ballou, Prosser & Anderson, Lorrin

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Andrews and E. W. Sutton, Deputies Attorney General, with him on the brief) for the Territory.

J. Lightfoot for defendants.

LIKEPA KEANU AND W. B. KEANU *v.* HATTIE KAMANOULU.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

SUBMITTED FEBRUARY 17, 1910:

DECIDED MARCH 5, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

FRAUD—*in fact as well as in law.*

Where a daughter obtains a deed from her aged parents for land without consideration, other than their affection for her, the understanding on their part, induced by her, being, that she only intended to mortgage the land to raise money with which to pay off a mortgage on her land, and that they would not be deprived of or in any way molested in the use thereof, but the intention of the daughter being to acquire full control of the land and to sell the same for her own use and benefit, and thus deprive her parents of the use and enjoyment thereof, presents a case of fraud in fact as well as in law rellevable in equity.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal from a decree dismissing plaintiff's bill filed by them to secure the cancellation of a deed and for the reconveyance of the property therein described on the ground that the same was procured from them by the defendant through fraud.

The facts averred and supported by the evidence are substantially as follows:—

That the plaintiffs are husband and wife, and the parents of the defendant; that they reside in Wailuku, on the premises in question, where they have had and have maintained their

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home during forty-five years last past; that they are respectively of the ages of sixty-three and seventy-three years; that they have had but little experience in business matters; that they speak no language but the Hawaiian; that the defendant, for some years last past, has resided in Honolulu; that on July 7, 1909, and long prior thereto, the plaintiffs had a life interest in the said premises,—the defendant holding the fee therein; that the area of said premises is about 4.90 acres, and, in addition to the use of the same by the plaintiffs as their home and for growing vegetables and other products thereon, they also receive therefrom about \$300 per annum as rental; that said premises constitute the principal means of livelihood available to plaintiffs; that a few days before the execution of the deed in question, the defendant arrived in Wailuku from Honolulu, and very soon thereafter represented to plaintiffs that she was in need of \$2000.00, or thereabouts, with which to pay off a certain mortgage on her Honolulu property, which mortgage was about to be foreclosed; that she proposed to her father and mother that they execute a deed to her thereby releasing their life interest in the premises in question to her so that she could then give a mortgage thereon for the purpose of raising money with which to pay off the Honolulu mortgage, and thus save her property, otherwise she would lose it; that her purpose was, as she said, only to mortgage the property in question and not to make any other use or disposition of it; that she led them to believe that even if they deeded their interest to her they would not be deprived of or disturbed in the use or possession of the premises; that plaintiffs might, as she assured them, safely put their trust in her; that plaintiffs placed full faith and confidence in defendant's representations, and relying upon her intention and ability to so use the property, and intending merely to place within defendant's hands the means whereby she might save her Honolulu property from sacrifice without impairing their enjoyment of their property, they did, on the 7th day of

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July, 1909, execute and deliver to defendant the deed in question, without value or consideration of any kind.

Very soon after, if not before, the execution of the deed defendant entered into negotiations for the sale of the property, and within ten days thereafter she actually entered into a contract with one J. K. Kahookele for the absolute sale thereof for \$3300, receiving thereon the sum of \$50. The consummation of this sale, however, has been stayed by order of the circuit judge pending this appeal.

The defendant is about forty years of age. She is quite well educated in English, understands and speaks English very well and is a woman of strong will, resolute, shrewd and positive. She has had some experience in business and in court proceedings.

The circuit judge, after a somewhat elaborate and analytical review of the evidence, as well as the making of numerous findings of fact—all adverse to defendant and favorable to plaintiffs—concludes as follows:—

“Notwithstanding the hardship upon the plaintiffs and the apparent probability that they will be rendered homeless in their old age, that an unloving and unworthy daughter will soon use up what money she can get by a sale of their home, still the court does not know of any law that will relieve the parents of the consequence of their own folly in doing and intending to do what they did do for the benefit of an ungrateful and selfish child. The court finds that the plaintiffs intended to give the defendant the power which the instrument in question gave her and that the fact that it was foolish for them to intend this and to do this does not warrant the court in making a new contract for them or of annulling the contract which they made and intended to make, however much the pity and the justice their complaint appeals to the heart and feelings of every right minded person.

The court regretfully concludes and finds that it can give no relief to the plaintiffs and that this suit must be and hereby is dismissed.”

We cannot concur in the conclusion thus reached by the learn-

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ed circuit judge. The record before us, as we view it, presents a case which most clearly and emphatically demands the exercise of that remedial power which equity has placed in the hands of the Chancellor for the very purpose of undoing and annulling such unconscionable transactions and betrayal of confidence and trust as the defendant is shown to have done in obtaining the deed in question and in her attempt to dispose of the property absolutely. The transaction is one that equity cannot uphold.

It is clear from an examination of the record that defendant acted in bad faith and her representations to plaintiffs were made with intent to deceive. A significant circumstance tending to show bad faith on her part was her objection to plaintiffs joining in a mortgage with her instead of their executing the deed to her. This circumstance alone tends to show that it was her purpose to acquire full, complete and absolute control of the property, and to sell it, being a purpose entirely different from that which she had stated to her parents.

Counsel for the defendant contends that even if the allegations of fact contained in the bill were established by the evidence, plaintiffs could not recover, and that the suit was properly dismissed, because, as he argues, it is a cardinal principle that no one has a right to rely upon what another says he intends to do; that the mere making of a promise to do something in the future does not constitute fraud, even though the promise was made in bad faith; and that, therefore, the promise of defendant to only mortgage the premises in question and not to make any other use or disposition thereof, is not a fraud cognizable in a court of equity. Whatever application this doctrine may have in other cases, we do not think it applies in the case before us. We are not now dealing with a question which only involves the violation of a bare promise between parties dealing with each other on an equal footing or at arms' length. The questions presented for our consideration

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are those which concern parties to a transaction between whom there exists that relationship which the law terms confidential. The record before us shows that the relationship between the plaintiffs and the defendant was confidential in fact as well as in law, and that both actual and constructive fraud has been committed in this case.

Upon the question of constructive fraud, Bigelow on Fraud, (Vol. 1, p. 261), says:

"When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion or, it is often said, a presumption of fraud."

In *Brison v. Brison*, 75 Cal. 525, a deed was executed by a husband to his wife, upon an oral promise by her that she would reconvey the property upon request. The promise by which the husband was induced to make the deed was in bad faith and false, and "made with intent on her part to deceive, and did deceive, the husband." The lower court gave final judgment for the defendant upon demurrer; the plaintiff appealed and the supreme court reversed the judgment, with directions to overrule the demurrer. The court in that case at page 527, say:

"We think there was actual fraud. As above stated, the complaint shows that the parol promise upon which plaintiff relied was false and 'in bad faith,' and 'made with intent to deceive.' The construction which we think must be given to this averment is, that the promise was made without any intention of performing it. This is a well-recognized species of fraud * * * It is to be observed of this ground that the essence of the fraud is the existence of an intent at the time of the promise not to perform it. But for such intent there would be no actual fraud. For it is well settled that the mere failure to fulfill a promise is not fraud. * * *"

Again, at page 528, the court say:

"But if the evil intent existed, there was actual fraud, and

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so far as this ground is concerned, it is immaterial whether there was a confidential relation or not (*Christy v. Sill*, 95 Pa. St. 387). But if the intent not to perform, above referred to, had not been averred we think the plaintiff is nevertheless entitled to relief upon the other facts alleged, on the ground of the confidential relation existing between the parties."

And again, at page 529, the court say:

"The relation of the parties to each other, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it.

The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive trust. This is independent of any element of actual fraud."

The doctrine applicable to transactions in which confidential relations are involved, is thus stated by Pomeroy:

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*" (Pom. Eq. Jur., Sec. 956).

The court in *Bohm v. Bohm*, 9 Colo. 100, 109, commenting upon the doctrine as above stated by Pomeroy, say:

"No illustration of the above rule can be stronger, than where an imposition has been practiced upon one party by the other, through confidence generated by the close ties of kindred—as that of parent and child. This is a relation in which the most implicit confidence is usually reposed in the good faith of each other, and, by reason of this intimate relation and confidence, the precautions which would usually be observed in other cases are often omitted, giving opportunities for the practice of imposition which would not be otherwise obtained. When children are of tender years, or inexperienced in matters of business, they may be thus imposed upon by their parents. Again,

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when the parents become aged, or in dependent circumstances, the situation of the parties becomes reversed, and the like imposition may be practiced, and advantage taken of them, by their children."

In 14 Am. & Eng. Ency. Law, 49, it is said:

"In ordinary cases, the general rule that failure to perform a promise is not fraud is recognized in equity as well as at law. But there are many cases in which a court of equity, to prevent fraud, will grant relief in the case of a mere failure to perform promises, the failure to perform the promise being regarded, under the particular circumstances, as a fraud in equity.

By the weight of authority, if a person, by means of a parol promise to reconvey, obtains an absolute conveyance without consideration, or a devise, from one to whom he stands in a fiduciary or confidential relation, a violation of the promise is a constructive fraud, and ground for holding him as a constructive trustee, although there may have been no intention not to perform at the time of the promise."

See also *Newman v. Smith*, 77 Cal. 22; *De Mallagh v. De Mallagh*, Id. 126; *Broder v. Conklin*, Id. 333; *Becker v. Schwerdtle*, 141 Id. 386; *Pomeroy*, supra, Secs. 955, 957; *Bispham*, Prin. Eq., Secs. 231, 235; 20 Cyc. 9, 34; *Jerome v. Bohm*, 21 Colo. 322; *Fischbeck v. Gross*, 112 Ill. 208; *Rozell v. Vansyckle*, 11 Wash. 79; *Meldrum v. Meldrum*, 11 L. R. A. 65.

We are clearly of the opinion that the plaintiffs are entitled to the relief prayed for, and that the dismissal of their bill was erroneous.

The decree dismissing plaintiffs' bill, therefore, is reversed, and the cause is remanded with directions to the circuit judge to order a reconveyance and to grant such other relief as may be appropriate. Defendant to pay all costs.

C. W. Ashford and A. N. Kepoikai for plaintiffs.

Atkinson & Quarles for defendant.

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TERRITORY v. CHARLES CHAMBERLAIN.

APPEAL FROM DISTRICT MAGISTRATE, WAILUKU.

ARGUED MARCH 3, 1910.

DECIDED MARCH 5, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

CRIMINAL LAW—*withdrawal of plea of guilty.*

An application for leave to withdraw a plea of guilty is addressed to the sound discretion of the trial court and the appellate court cannot interfere in the absence of abuse of discretion.

Upon the evidence in this case the magistrate is held not to have committed an abuse of discretion.

OPINION OF THE COURT BY PERRY, J.

Defendant, a married man, was arrested on January 21, 1910, on a charge of having had unlawful sexual intercourse with one May Saunders, not his wife, during the month of December, 1909, and on the same day entered a plea of guilty before the district magistrate of Wailuku and was sentenced to imprisonment for twelve months and to pay a fine of \$100, the maximum punishment for the offense. Three days later defendant presented a motion for leave to withdraw his plea of guilty and to enter a plea of not guilty. This motion was heard and denied on January 28. Defendant appeals to this court on points of law, assigning as error the magistrate's ruling upon the motion.

The Territory moves to dismiss the appeal on the grounds (1) that no points of law are certified by the magistrate, and (2) that no appeal having been taken from the judgment and sentence of January 21 the appeal from the ruling of January 28 is nugatory. These motions are denied. The notice of appeal sufficiently sets forth the points of law relied on and the magistrate's certificate sufficiently refers to the notice for a statement of those points. The failure to appeal from the original

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judgment and sentence does not deprive the defendant of the right of appeal from the refusal of leave to change his plea.

The parties are agreed that the magistrate had the power in his discretion to grant or to deny the application for leave to withdraw the plea of guilty as in his judgment the facts should warrant and justice require. The only question arising on this appeal is whether the magistrate committed an abuse of discretion in refusing leave. In considering the application the magistrate had before him affidavits by the defendant, his wife, May Saunders, Enos Vincent, the deputy county attorney, Clement Crowell, deputy sheriff, H. C. Mossman, clerk of the county attorney, W. E. Saffery, county sheriff, Marie Grove, stenographer, and four practicing physicians and surgeons.

Defendant in his affidavit said that he was twenty-six years of age, admitted that on the night of January 19, 1910, on returning home he found his wife and another woman in an intoxicated condition and that his wife accused him of having been unduly intimate with May Saunders, who is his step-daughter; that he caused his wife's arrest but the next morning went to the police station to endeavor to procure her release; that he found May at the station and while waiting for the magistrate she was called into the sheriff's room for the purpose, as he supposed, of being questioned concerning her mother's conduct on the evening previous; that shortly after that Crowell called defendant into the station and that there Vincent accused him of having illicit relations with May and that he, defendant, denied the truth of the accusation; that thereupon Vincent told him that May and his wife had said that he had had such relations and that he, the defendant, again made denial; that Vincent then said, "You had better tell me the truth or I will send you to seven years' punishment in the prison; if you plead guilty I will make it easy for you;" that Vincent also said that May had told him that the defendant had had intercourse with her seven times; that by reason of these

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threats and promises and also because he felt that the court would believe the child and the mother he "said yes to everything they said the child said." Proceeding in his affidavit the defendant admits that the officers thereupon sent for "a young white woman," whose name he did not know, but who the record shows was Marie Grove, whose affidavit is also on file, and that in her presence they asked him some questions; that "it was so revolting to me and I was so frightened that I said that it was the child's fault and that she hung around me and played around me;" that he never had intercourse or indulged in any undue familiarities with her.

The wife in her affidavit admits the intoxication on the 19th; does not undertake to deny that on that occasion she charged the defendant with the intimacy; says that she never noticed or had reason to believe that there was any intimacy between the defendant and the girl, and that May was at all times well behaved and innocent of any wrong doing of the kind in question.

May Saunders in turn declares her entire innocence of the improper conduct charged; that defendant's conduct towards her had always been unobjectionable; that in Vincent's interview with her she had not understood the true purport of the questions asked her; that Vincent threatened that he would "hit with a rawhide any little girls that would tell a lie;" that "little girls that told a lie might be put in jail;" that she was very badly frightened and answered in the affirmative further questions as to the defendant's guilt.

Each of the physicians made a physical examination of the girl as well as of the defendant. Two of them, called for the defense, gave it as their opinion that May had never had intercourse with any male, one of them adding that in his opinion intercourse would have been impossible. The other two, called by the prosecution, while not attempting to say whether there had been intercourse, were of the opinion that it could have taken place.

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In their affidavits the officers make a complete denial of all of the accusations relating to threats and promises. Vincent says that in reply to questions the defendant admitted the truth of the charge saying that he had committed the offense with May on seven different occasions, the first one in the house referred to as "Bailey's cottage," in which the parties were living at the time, while his wife was at Keanae, and on another occasion at their present residence while his wife was "down town;" that defendant said that a certain boy, whose name he did not know, was the first one who had illicit relations with May; that this interview was on the morning of January 20, and that later in the morning in the presence of Marie Grove, the official stenographer of the county attorney's department, he had another interview with the defendant, a stenographic report of which was made by Miss Grove; that on the same day May admitted to the deponent the illicit relations on seven different occasions, stating that three occurred in Bailey's cottage and four in their present home. In this affidavit are set forth certain other details as having been given by May with relation to the first occurrence, but they need not be here repeated.

Crowell, who, according to all of the affidavits on the point, was present at the interviews, corroborates Vincent as to the absence of threats and promises and as to the nature and extent of the admissions made by the defendant and May. Mossman's affidavit is to the effect that he also questioned May and that she made similar admissions to him, one as to an act during her mother's absence at Keanae, giving certain particulars of the occurrence.

Miss Grove affirms that while she was present there was nothing in the way of threats; that the defendant answered "with little or no hesitation and without any visible evidence of fear or constraint," and swears to the correctness of the document which is attached to her affidavit as a transcript of her steno-

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graphic notes of the interview which she attended. As so reported the defendant made substantially the admissions testified to by Vincent and Crowell, stating with some particularity how the intimacy arose and developed, and further admitted that "a few nights ago" his wife questioned him as to his relations with the girl, adding that he made no reply but "walked out and went down to work."

The sheriff, who apparently was not present at any of the interviews, deposes that immediately after the imposition of sentence the defendant asked him to send for an attorney, saying that "he thought the sentence too much" and wanted "to get the sentence reduced;" that he asked the defendant "if he had really had sexual intercourse with the girl" and that the defendant said "yes," and had then added "that she had coaxed him to do it to her, so he did what she wanted;" that defendant "then repeated that he thought Judge McKay had given him too long a sentence," and that he wanted the attorney "to have it cut down."

Not only did the magistrate have all of this evidence before him, but he knew the officers in question and may well have been acquainted with all of the witnesses. He also had the benefit at the original hearing of seeing the defendant in person and of hearing him and noting his demeanor at the time of the entry of the plea. The magistrate was in a better position than we are to judge of the truth or falsity of the charge that the plea had been obtained by intimidation or in consequence of promises or other inducements and also whether the admissions were in fact made and if made whether they were true. The presumption is that in deciding as he did he felt convinced that the facts and justice required a denial of the motion, that the plea was entered voluntarily and without improper inducements and was in fact true, and that defendant's desire to change his plea arose simply from a belief that the sentence was too severe. Upon the state of the evidence, con-

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tradictory though it was, we cannot say that he was guilty of an abuse of discretion in so deciding.

The ruling appealed from is affirmed.

E. W. Sutton, Deputy Attorney General (A. Lindsay, Jr., Attorney General, and D. H. Case, County Attorney of Maui, with him on the brief), for the Territory.

D. W. Burchard (A. N. Kepoikai and A. G. Correa with him on the brief) for defendant.

No. 40. LIKEPA KEANU AND W. B. KEANU, HER HUSBAND, v. HATTIE KAMANOULU. Appeal from Circuit Judge, Second Circuit. Petition for Rehearing filed March 14, 1910. Decided March 15, 1910. Hartwell, C. J., Perry and De Bolt, JJ. Per curiam: The petition claims that the court ought to have passed upon the question of joint tenancy or tenancy in common under the deed to the defendant of May 16, 1903, from the plaintiff and her husband and two others, and that the co-grantors ought to have been made parties, and also that under the "established rules of evidence, law and equity which everywhere are applied" the allegations of fraud and bad intent on the part of the defendant are not supported by the evidence, which, as claimed, is "a mass of suppositions, conclusions without foundations to support them, and incompetent." The court as well as the circuit judge was well satisfied by the evidence that the defendant had obtained her deed from her parents by fraud, a term which includes undue influence, misrepresentation and imposition in all its varied forms, drawing this inference without departure from any rules of law or common experience. The relief to be granted under the decree is merely to reinstate the parties to their exact position with reference to each other at the time of and immediately prior to the execution and delivery of the plaintiffs' deed to the defendant. This would in no way affect the rights of co-grantors

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not joined as parties. The variance, if any, between the pleadings and the proof was immaterial. It was unnecessary to determine the extent of the plaintiffs' rights immediately prior to the execution of the instrument in question, for the relief granted is merely that the defendant reconvey all of the interest, whatever it was, which the plaintiffs had conveyed to her. Petition denied under the rules without argument.

C. W. Ashford and A. N. Kepoikai for plaintiffs.

Atkinson & Quarles for defendant.

THE TERRITORY OF HAWAII v. SAM APOLIONA,
GEORGE KAEA, WILLIAM VIDA AND KEKIPI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 21, 1910.

DECIDED MARCH 23, 1910.

HARTWELL, C.J., PERRY, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF DE BOLT, J.

EVIDENCE—*sufficient to support verdict.*

The evidence in this case held sufficient to support the verdict.

OPINION OF THE COURT BY PERRY, J.

The defendants were found guilty by a jury of the offense of "being present" on a day named "at a certain place" in Honolulu "where a certain gambling game was being carried on, to wit, seven-eleven, at which certain things of value, to wit, money, were lost and won." They except to the verdict on the ground that it was contrary to the law and the evidence and the weight of the evidence and also to the overruling of their motion for a new trial. The only question presented is whether or not there was evidence sufficient to support the verdict. Taylor, a witness for the prosecution, testified that on the day

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named he saw the defendants seated around a table in the cellar of a building in Honolulu; that the entrances and approach to the cellar were so arranged as to make the latter difficult of access; that while approaching the cellar and before seeing the defendants he heard the jingling of money apparently from below, and also voices and the snapping of fingers and bones; that before entering the cellar he looked through an open trap door immediately above it and from that position saw the defendants seated around a table; that a blanket spread on the table had on it certain chalk marks and numbers representing what is known as the "field" in a crap game; that on the table he saw money, quarters and half-dollars; that he saw money thrown on the table and picked up and passed off; that at times the table would be clear and then again more money would be placed on it; that he saw dice there accompanied "by the noise of snapping fingers;" that he watched the game for almost a minute; that the game that the defendants were playing was seven-eleven; that he "could see hands reaching in and taking up money, later see two dice rolling across the table;" that as the witness entered the cellar he saw hands pick up the money and dice and that by the time he reached it the whole table was clear again and those in the room all started for the stairway and left; that he saw hanging on the end of the table something resembling a large field glass case but which on further inspection proved to be a "kitty-box, that is where the percentage of the game goes if you need money;" that there were coins in this box; that upon the witness saying to one of the defendants, "Well, Vida, I have got the kitty-box anyway," that defendant replied in part, "You haven't got it yet" and thereupon took hold of the witness and caused him to surrender the box; that seven-eleven is a gambling game in which money is won and lost.

The statute under which the defendants are charged (R. L., Sec. 3175) is as follows:

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"Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game with cards, dice or any devices for money, checks, credit or any representative of value or any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor."

It is contended on behalf of the defendants that in order to support a conviction it was necessary to show that the game testified to was a banking or percentage game. This contention is without merit. The language of the statute plainly includes within its prohibition every "other game in which money or anything of value is lost or won," irrespective of whether or not it is a banking or percentage game. The evidence was sufficient to permit of a finding by the jury that a game was being played and that it was one at which money was lost and won and also, although this need not have been proved, that it was a percentage game.

Three of the defendants and two other witnesses testified for the defense to the effect that no gambling was going on at the time of Taylor's visit. This merely raised an issue of credibility and does not affect the sufficiency, as a matter of law, of Taylor's testimony to support the verdict. •

The exceptions are overruled.

A. Lindsay, Attorney General, J. W. Cathcart, City and County Attorney. and F. W. Milverton, Deputy City and County Attorney, for the Territory.

J. Lightfoot for defendants.

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FREDERICK J. LOWREY, GEORGE P. CASTLE AND
WILLIAM O. SMITH, TRUSTEES, v. THE TERRI-
TORY OF HAWAII.

MOTION FOR JUDGMENT.

ARGUED MARCH 21, 22, 1910.

DECIDED MARCH 23, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

COSTS.

Attorneys' commissions and fees are not recoverable against the Territory (following *Bowler v. Board of Immigration* and *Cleghorn, Collector of Customs, v. Luce*, 7 Haw. 715, 1889).

JUDGMENT—*nunc pro tunc*.

A judgment in this case is entered at the date of its rendition, and not "as of" the date of a former judgment which was reversed on appeal to the United States supreme court.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiffs claim \$382.50 as attorneys' commissions as in actions of assumpsit, and \$31 for other attorneys' fees named in the statute upon a judgment in their favor for \$15,000 ordered by the United States supreme court reversing the judgment of this court in an action against the Territory to recover that sum for breach of an agreement made with the American Board of Foreign Missions by the government of the Hawaiian Monarchy in 1849 that in carrying on the Lahainaluna school it would not "teach or allow to be taught any religious tenet or doctrine contrary to those theretofore inculcated by the mission and expressed in the Confession of Faith," set forth in the opinion in 19 Haw. 123, 131, 132.

In *Bowler v. Board of Immigration*, and *Cleghorn, Collector General of Customs, v. Luce*, 7 Haw. 715 (1889), it was held that attorneys' fees and commissions were not recoverable against the government, the court saying (p. 716):

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"We think it a sound principle that where the Government *eo nomine* is sued or brings a suit, or where a department or bureau or officer of the Government has brought suit or is sued concerning matter which in fact is not personal, but involves a claim of the Government as plaintiff, or a liability of the Government as defendant, the plaintiff recovering should not have judgment for attorney's fees or commissions, nor should the plaintiff on losing be taxed with attorney's fees and commissions on the amount sued for."

The practice undoubtedly has since conformed to this ruling and we see no reason for reconsidering or reversing it. The plaintiffs claim in their petition, which is not entitled in assumption, is for "fifteen thousand dollars" for which they pray judgment, not asking costs.

The plaintiffs also ask that their judgment be "entered as of September 8, 1908," the date of the judgment for the defendant which has been reversed, their object being to obtain interest on the judgment from that date, the statute declaring (Sec. 2007 R. L.) that "no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court unless upon a contract expressly stipulating for the payment of interest." They claim that since the United States supreme court has held that this court was in error they have been wronged and kept out of the use of the money since the date of our judgment against them, and that it is equitable that the judgment in their favor be antedated. The Territory opposes this claim and submits that the statute does not allow interest after judgment unless stipulated for by contract.

It is unnecessary to pass upon this matter, but only to decide whether the judgment shall be entered upon the day of its rendition or be made retrospective in effect. It is true that, overruling this court, the United States supreme court held that the Hawaiian government engaged to teach "the definite religious doctrine expressed in the confession of faith," and that it was not enough "that religion should be taught, and that as

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taught it should not be contrary to the doctrines mentioned," or that "from 1877 until the present date the course of religious instruction has been substantially the same," and that if there had been any breach of the agreement as early as 1877, acquiesced in by the parties, this would not amount to a waiver of the plaintiffs' claim.

The statute, however, is imperative in prohibiting interest prior to the time of the rendition of judgment. Nor does the case come within the class in which delay of the court in coming to its conclusion or the death of a party after the trial and submission of a cause requires that the judgment be given effect, if at all, as far back as the day of submission. See 1 Freeman on Judgments (3 Ed.), §§ 57, 68.

The judgment must be dated on the day of its rendition, and is to be entered on the same day.

D. L. Withington and C. H. Olson for plaintiffs.

E. W. Sutton, Deputy Attorney General, for the Territory.

DAVID KAHANANUI, ELIZABETH POOKAPU, AND
MARY P. KAWAIMAKA *v.* JAMES H. MAUNAKEA
SR., JAMES MAUNAKEA, ELIZABETH, OR ELI-
KAPEKA MAUNAKEA KAMUKAHI, WILLIE MA-
UNAKEA, JIM, ALIAS IAMEKA MAUNAKEA,
JOSEPH MAUNAKEA, LILIA MAUNAKEA AH
TAI, AND W. R. CASTLE, ADMINISTRATOR OF
THE ESTATE OF ELIZABETH IPUHAO SNIF-
FEN, DECEASED.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 22, 1910.

DECIDED MARCH 24, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

DESCENT AND DISTRIBUTION—*the word "children" in statute including grandchildren.*

Under the "General rules of descent," Sec. 2509 R. L., the word

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"children" includes grandchildren in the clause providing that "if the intestate be a woman and shall leave no issue nor father nor mother her estate shall descend one-half to her husband and the other half to her brothers and sisters and to the "children" "of any brother or sister by right of representation."

OPINION OF THE COURT BY HARTWELL, C.J.

At the hearing of the administrator's petition for a decree of final distribution the plaintiffs, being a grandnephew and two grandnieces of the intestate, claimed to be entitled to share equally with the children of the decedent's niece who survived her and had since deceased and assign error in the decree excluding them from taking. The decedent left a husband, whose share of one-half of the estate is not disputed, the question being whether the words in the statute (Sec. 2509 R. L.), "The children of any brother or sister by right of representation," include grandchildren of a sister or brother, the statute upon the subject reading: "If she shall leave no issue, nor father, nor mother, her estate shall descend one-half to her husband and the other half to her brothers and sisters, and to the children of any brother or sister by right of representation." In support of their contention that the statute does not include children of the first generation only the plaintiffs point out that if there were no nieces or nephews but only grandnieces and grandnephews who could not take, there would be no one to take the estate under the paragraph immediately following, reading: "If the intestate shall leave no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any; or in case the intestate be a woman, to her husband, if any;" and also that if there were no surviving husband or wife but three grandchildren of a deceased uncle the grandchildren could not take as next of kin under the next provision of the statute: "If the intestate shall leave none of the *said relatives* surviving nor widow nor husband the estate shall

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descend in equal shares to the next of kin in equal degree." grandnieces and grandnephews of sisters or brothers being nearer of kin than grandchildren of an uncle and yet not entitled to take unless by the construction of the statute contended for by the plaintiffs. It is further suggested in respect of the statute (Sec. 2519 R. L.): "If the intestate leave no kindred his estate shall escheat to the Territory," that unless the plaintiffs' contention is sustained there would be no inheriting kindred, leaving the estate in an anomalous condition.

The decree was based upon the decision of Chief Justice Judd in *Aihonua v. Ahi*, 6 Haw. 410 (1883), in which the defendant's claim as grandson of the decedent's sister was disallowed under the paragraph of the statute now under consideration, but before the amendment of 1898.

The object of the statutes of descent is to prescribe rules for succession of the property of any person dying intestate, which "shall descend to and be divided among his heirs as in this chapter prescribed." Sec. 2507 R. L. The amendment, Ch. 1 S. L. 1872, gave to the wife's father and mother, brothers and sisters the same inheriting rights in her property which the husband's relatives had and added the provision that in case of her leaving no issue, father, mother, brother or sister her estate went one-half to her husband, if any, and one-half to brothers and sisters of her father and mother (uncles and aunts) and to "their children and heirs by right of representation." Such was the statute in 1883 when Chief Justice Judd held that the grandson of a deceased sister of the intestate did not inherit, as the statute does not say "to the children and heirs" of a deceased brother or sister; "if it did, Hiwauli, as the grandson of Hiki's sister, would inherit equally with Napoe. Napoe is one degree nearer Hiki than Hiwauli, and inherits to his exclusion." *Ahionua v. Ahi*, 6 Haw. 410, 411. Although there has been no change in the paragraph of the statute under which that decision was made the amending act

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of 1898 (Act 47 S. L. 1898) repealed the former amending act of Sec. 1448 C. C. (Ch. 1 S. L. 1872). That section as so amended, in place of the last two paragraphs of Sec. 1448 C. C., after providing for inheritance by the husband and relatives of a woman dying intestate without issue, enacts that "if the intestate" (whether a married woman or man) "shall leave no issue, father, mother, brother or sister, *nor descendants* of any deceased brother or sister" (who would include grand-nephews and grandnieces) the estate shall descend to the intestate's husband or widow, and that "if the intestate shall leave none of the *said relatives* surviving, nor widow nor husband the estate shall descend in equal shares to the next of kin in equal degree." Act 47 does not reenact the last paragraph of Sec. 1448 C. C. which provided that the widow should inherit all of the husband's estate if he "leave no kindred but a widow" and that the husband should inherit all his wife's estate if she "leave no kindred but her husband."

It may as well be inferred from the statute that the intention of the legislature was that if husband or wife should not survive, the next of kin should take in the absence of issue, father, mother, brother, sister, nephews or nieces—they being the relatives previously enumerated—as that only upon failure of those relatives and of grandchildren of brothers and sisters the next of kin should take; but it is not so readily to be inferred that a widow or husband could take one-half of the estate if there were nephews and nieces but could take nothing if there were only grandnieces and grandnephews. In order to avoid such an irrational disposition of an intestate's property it would be necessary to consider that the word "descendants," which includes grandchildren as well as children, is used coterminously with "children" and is perhaps so used for no other reason than to avoid the more cumbrous expression of "grandchildren of a brother or sister." The word "descendants" would not naturally be used for "children" in the meaning of offspring

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and its use in the amending act of 1898 gives the impression that brothers' and sisters' children were intended to include any of their lineal descendants, taking the place of uncles and aunts and their children "and heirs" who took before the act of 1898, but who now take if there are no nephews or nieces or their lineal descendants, taking then as next of kin. Either the "descendants" who hold up the descent must include children's children or else the statute, expressly providing for rules for the descent of an intestate's property, would be futile for the accomplishment of that object and it would be absurd to suppose that such effect was intended.

There are numerous cases under wills "in which it has been held that the testator, by using the words 'child' and 'issue' indiscriminately, has shown his intention of using the former term in the sense of 'issue' so as to entitle grandchildren to take under it." 2 Williams on Executors, 1183, and cases cited n. f., especially *Prouitt v. Rodman*, 37 N. Y. 42; and see *Bowker v. Bowker*, 148 Mass. 198, 203, and cases there cited.

There is a class of cases requiring that if any child of an intestate shall have been advanced by him in his lifetime an amount equal to the share allotted to the other children such child shall have no share of the estate or only such share as when added to the amount advanced shall equalize the shares of the other children. As shown in *Eshleman's Appeal*, 74 Pa. 42, the word "child" under such act, as well as under English decisions upon an early statute to the same effect, is held "to extend to a grandchild," so that "grandchildren and great grandchildren are all children and come within that to certain purposes." And see under a similar statute in *Beebe v. Estabrook*, 79 N. Y. 246, 250, "the word *children* in the section quoted is used to designate all the descendants of the intestate entitled to share in the distribution." The reason for taking "children" to include "descendants" in cases of wills is well expressed in *Mowatt v. Carow*, 7 Paige's Ch. 328, 333. "Where

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for instance the will would otherwise remain inoperative and it is necessary to extend the meaning beyond the natural import of the word in order to effectuate the object and apparent intention of the testator, as in *Wilde's case* (6 Coke's Rep. 16.) or where the testator has clearly shown by other words, such as issue or descendants, used promiscuously with the term children, that he did not intend the latter to be understood merely in its natural sense but in the more comprehensive sense of issue or descendants generally."

A case which appears to be more directly in point than any others of which we are informed is *Walton v. Cotton*, 19 How. 355, under an act of 1832 giving pensions to revolutionary soldiers, which in case of the death of any person embraced by the act were directed to be made to his widow, "or if he leave no widow to his children." The question was presented whether the statute would extend a bounty to grandchildren or restrict it to the children living at the time of the soldier's death. The court held that "the word 'children' in the acts embrace the grandchildren of the deceased pensioner whether their parents die before or after his decease," basing this conclusion upon the fact that if there were "no widow or children, but grandchildren, the pension cannot be drawn from the Treasury. This would seem to stop short of carrying out the humane motive of Congress. They have not named grandchildren in the acts; but they are included in the equity of the statutes. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children."

Considering the object and context of the present statute and its amendment in 1898, the rules for construction expressed in Secs. 9, 10, 11, 12 and 13 R. L., and the absurd results which otherwise would follow we are clearly of the opinion that the "children" intended include "grandchildren" in this case, so that the plaintiffs are entitled to a share of the intestate's estate as claimed by them.

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Decree reversed, case remanded for appropriate proceedings.

P. L. Weaver (*Magoon & Weaver* on the brief) for plaintiffs.

W. C. Achi for defendants.

D. L. Withington, for the administrator, submitted the case without argument.

Y. SOGA, Y. TASAKA, M. NEGORO AND F. K. MAKINO v. WILLIAM P. JARRETT.

PETITION FOR WRIT OF HABEAS CORPUS.

ARGUED MARCH 24, 1910.

DECIDED MARCH 29, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

HABEAS CORPUS—*Denial of writ.*

The writ of habeas corpus to obtain release from imprisonment under sentence imposed by the judgment of a circuit court on the claim by the petitioners that the court had no jurisdiction and that the judgment was void is denied since the claim based on the same grounds has been presented on exceptions which were overruled and is therefore finally adjudicated by this court and the result of issuing the writ would be to remand the prisoners.

OPINION OF THE COURT BY HARTWELL, C. J.

The petitioners applied for a writ of habeas corpus to obtain release from imprisonment imposed by a judgment of the circuit court of the first circuit in which they were tried upon the complaint of the high sheriff charging them with conspiracy and convicted of conspiracy in the third degree, the verdict being rendered by only eleven jurors the defendants consenting to the withdrawal of one juror during the trial. They moved in arrest of judgment on the same grounds upon which the petition for a writ of habeas corpus is based, excepting to the denial of the motion. The exception was allowed and in-

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cluded in their bill of exceptions brought here from the circuit court, which after elaborate argument and full consideration were overruled. It was solely upon these grounds, all of which are set forth in the opinion of the court (20 Haw. 71), their substance being that the defendants were held under a complaint of the high sheriff and not under an indictment, that a juror was withdrawn by consent and that evidence claimed to be irrelevant was allowed, that the petitioners claim, as they did in their bill of exceptions, that the judgment of the circuit court was void. The attorney for the petitioners, who represented them at the trial and at the hearing on the exceptions, says that this court gave full consideration to these matters and that he could hardly ask to reargue them but he desires the writ to issue in order that the petitioners upon being remanded may appeal to the United States supreme court. *In re Nielsen*, 131 U. S. 176, is cited as authority for discharging a prisoner from custody on habeas corpus if the judgment under which he is held is void. Such undoubtedly is the law upon the subject. But the difficulty of discharging the petitioners from custody on this ground is that by a final adjudication we held that they were legally tried, convicted and sentenced, and that no new matter is stated and no argument or reason is suggested for holding otherwise.

Under Sec. 2054 R. L. the petitioners are not "entitled as of right to demand and prosecute the said writ," and by Sec. 2055 R. L. the issuing of the writ is discretionary with the court. Under Sec. 755 U. S. Rev. St. the writ issues "unless it appears from the petition itself that the party is not entitled thereto," and "need not therefore be awarded if it appear upon the showing made by the petitioner that if brought into court and the cause of his commitment inquired into he would be remanded to prison." *Ex parte Terry*, 128 U. S. 301. This court "has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had there-

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in by one of the parties to the proceedings now before it.”
Dimmick v. Tompkins, 194 U. S. 540, 548; and see *In re Boardman*, 169 U. S. 39, 44.

The writ must therefore be denied and it is so ordered.

J. Lightfoot for petitioners.

Alexander Lindsay, Jr., Attorney General, E. W. Sutton, Deputy Attorney General, and M. F. Prosser for respondent.

IN THE MATTER OF JOHN II ESTATE, LIMITED,
AND HO HIN, UPON PROCEEDINGS FOR CON-
DEMNATION BY THE OAHU RAILWAY AND
LAND COMPANY.

PETITION FOR APPOINTMENT OF APPRAISERS.
HEARING BEFORE THE CHIEF JUSTICE.

The John II Estate, Ltd., certain land of which corporation is sought by the petitioner to be condemned for the purposes of its railway, appeared at the hearing April 5, 1910, by its attorneys Magoon & Weaver, who demurred to the petition on the ground substantially that the proceeding should be brought not under Act 86 S. L., 1909, but under the provisions of Chapter 65, R. L., and without waiving the demurrer filed an answer to the petition denying “that the said proceeding is necessary for the petitioner as alleged to enter upon or take the possession of the land.”

In the argument upon the demurrer the contestant claimed that Act 86 does not by implication repeal any of the provisions in Chapter 65. The demurrer was overruled in view of Sec. 1 of Act 86, which declares that “the procedure for the taking of property by any railroad company under the powers enumerated in Sec. 785 of the Revised Laws of Hawaii shall be as follows.”

The petitioner then showed its contract with the superintendent of public works, an affidavit of its publication of notice of intention to take the property and the defendant's refusal of an

In re *Il Est.*, 20 Haw. 122.

offer for it, and showed by the testimony of one Denison, assistant superintendent of its railway, that the land sought to be condemned was required for a depot, water tanks and siding to relieve the present congestion in its traffic which he said is injurious to the public. The contestant admitting receipt of notice to apply for appointment of appraisers the chief justice appointed Messrs. Charles T. Wilder, J. M. Monsarrat and J. A. Thompson, and signed an order to that effect.

S. N. CASTLE ESTATE, LIMITED, A CORPORATION;
AND W. R. CASTLE, TRUSTEE, *v.* A. HANEBERG,
ADMINISTRATOR OF THE ESTATE OF L. AHLO,
DECEASED; H. HACKFELD & COMPANY, LIM-
ITED, A CORPORATION, AND KANEOHE RICE
MILL COMPANY, LIMITED, A CORPORATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 28, 1910.

DECIDED APRIL 11, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

EQUITY—presentation of claim to administrator.

Presentation of a claim to an administrator does not of itself operate as a waiver of a lien upon the estate of the decedent.

Id.—accounting by administrator.

Under the circumstances of this case equity has jurisdiction to require the administrator to account for his acts concerning property or the proceeds thereof which has come to his hands on which plaintiffs have a lien.

MORTGAGE—after acquired property.

A mortgage of "all that certain rice plantation, * * * and all additions and accretions thereto or connected therewith or to be therewith connected, * * * and all other species of property part and parcel thereof or to become parcel thereof," covers lands originally leased and afterwards either purchased or newly leased, as

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well as newly acquired leasehold or fee simple lands, which are essential and appropriate to the use and operation of the plantation as a "going concern."

Id.—*assignment of mortgage notes.*

Assignment of the notes operated as an assignment of the mortgage although there was no formal assignment of the mortgage.

PLEADING—*bill in equity—multifariousness.*

A bill is not multifarious where one general right is claimed though the defendants may have distinct interests.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by plaintiffs from a decree of a circuit judge of the first circuit sustaining defendants' demurrers and dismissing plaintiffs' bill.

The facts alleged in the bill, so far as they are material to the questions arising upon the demurrers, are, in substance, as follows:

That on May 1, 1884, one Lee Ahlo, to secure the payment of \$5000 executed to W. R. Castle, trustee, a mortgage covering "all of that certain rice plantation at Kaneohe, Oahu, with the property connected set forth in the annexed schedule; also all the cane and rice business of mortgagor at Hceia, noted more fully in the annexed schedule forming a part of this mortgage;" that the schedule referred to contains a list of twenty-seven leaseholds, together with the following:

"And also the agreement and all rights, privileges and benefits pertaining to said agreement aforesaid."

"All crops, growing or to be grown on any and all parts of the premises demised as aforesaid and all additions and accretions thereto or connected therewith or to be therewith connected during the continuance hereof, all working animals, all tools and implements now there or to be thereon placed during the existence hereof and all other species of property part and parcel thereof or to become parcel thereof as aforesaid."

That this mortgage was duly recorded May 31, 1884; that from the date of the mortgage until his death, July 3, 1906.

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Ahlo continued in possession of and carried on the rice plantation; that before his death all the leases enumerated in the schedule referred to had expired, but from time to time he had acquired title, either by further leases or by purchase in fee simple, of the larger part of the premises described in the schedule, together with other property "near by," as well as working animals, tools and implements; that Ahlo thereafter executed seven mortgages to H. Hackfeld & Co., Ltd., one of the defendants, covering substantially the same property included in the original leases and also certain other lands alleged to have been subsequently acquired and used in connection with the plantation; that at all times, down to the date of his death, Ahlo recognized the Castle mortgage as a valid lien on the plantation and upon all property connected therewith, and from time to time he made payments thereon; that H. Hackfeld & Co., Ltd., as agent for Ahlo, in 1903 and 1904 respectively made two payments on the principal debt secured by this mortgage to prevent foreclosure proceedings being instituted thereon; that on August 15, 1906, defendant A. Haneberg was duly appointed administrator of the estate of Ahlo; that on August 26, 1906, the Castle Estate, assignee of the mortgage debt, duly presented its claim to the administrator, which was allowed; that the administrator was notified by the Castle Estate that it claimed a lien on the plantation and that by agreement segregated accounts were to be kept by the administrator of all moneys received from the plantation; that the administrator was authorized to sell growing crops by order of court subject to valid and existing mortgages; that this agreement on the part of the administrator has not been performed, although he has sold rice from the plantation and received therefor in cash a sum largely in excess of the amount due the Castle Estate on its claim, together with other amounts received from the sale of other personal property on the plantation; that the defendants, A. Haneberg and H. Hackfeld & Co., Ltd., confederating together in order to deprive

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plaintiffs of their claim against the Ahlo estate and their lien upon the property covered by said mortgage, entered into an agreement by which H. Hackfeld & Co., Ltd., foreclosed its mortgages by a sale at public auction, at which James F. Morgan, the auctioneer, purchased the property as trustee, the real purchaser being A. Haneberg, who thereafter organized the defendant corporation, Kaneohe Rice Mill Co., Ltd., to which foreclosure deeds were accordingly executed; that plaintiffs prior to the sale notified the administrator that they proposed to take steps to establish the lien claimed by them under the Castle mortgage and to prevent the property from being sold under foreclosure of the Hackfeld mortgages; that defendants, Haneberg and H. Hackfeld & Co., Ltd., induced plaintiffs to refrain from taking such proceedings at that time by assurances that the question at issue would be submitted to the supreme court upon an agreed statement of facts; that the plaintiffs remained in ignorance of the acts of Haneberg and H. Hackfeld & Co., Ltd., respecting the foreclosure sale until about January 1, 1910, and that they have been unable to secure from defendants an agreed statement of facts upon which this matter might be submitted to the supreme court; that the accounts of the administrator are involved and incomplete, and from them plaintiffs are unable to ascertain what has become of the property upon which they claim a lien.

The bill prays that plaintiffs' mortgage be declared a superior lien on all the property in question; that defendants be required to account for the property of the estate of Ahlo, as well as all the proceeds thereof which have come to their hands and for general relief in connection with all the personal property of the Ahlo estate which has come into his possession or into the possession of any of the defendants, and that plaintiffs may have such other general relief as they may be entitled to receive.

To the bill each of the defendants interposed a demurrer, the

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defendants, H. Hackfeld & Co., Ltd., and the Kaneohe Rice Mill Co., demurring upon the grounds of want of equity and multifariousness, and the defendant, A. Haneberg, demurring upon the same grounds and upon the further ground that a court of equity is without jurisdiction to compel an accounting with respect to his acts as administrator.

The demurrers were sustained upon the ground that the Castle Estate, having presented its claim to the administrator and the same having been allowed, was thereby estopped from proceeding in equity to obtain satisfaction under the mortgage.

1. The presentation of the claim by the mortgagee to the administrator and obtaining its allowance was required by statute (R. L. Sec. 1851), and was not of itself a waiver of the claim, nor did it operate as an estoppel.

The defendants in support of their contention that the presentation of the claim to the administrator operated as a waiver of the security, cite *Ching Tam She v. Oriental Life Ins. Co.*, 19 Haw. 663, as well as decisions from Massachusetts, New York and other jurisdictions. In the *Ching Tam She* case, the judgment creditor had no lien on the land of the decedent and after having obtained the allowance of the claim by the executrix and pending the settlement of the estate, the creditor sought to enforce the judgment by an execution sale of the land. This was inequitable as to the other claimants and the creditor was accordingly restrained. This principle of equitable estoppel which was applicable in the case cited does not apply in the case now before us, because the property, on which the plaintiffs in this case hold a mortgage, is not, by reason of such lien, available for the payment of creditors in general, except as to any surplus that might remain after foreclosure sale under said mortgage.

As held in *Estate of Kapu*, 18 Haw. 369, a secured creditor cannot be paid pro rata on his entire claim and then apply his security in payment of the balance of his claim, but such claim-

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ant is entitled to be paid pro rata out of the general assets only after he shall have realized upon his security to its full extent.

We have no statute, as in Massachusetts and New York, and presumably in the other states from which decisions are cited, requiring an administrator when an estate is insolvent to report this fact to the probate court which then appoints commissioners of the insolvent estate to whom all claims are referred and who marshal them, requiring that mortgages and other liens and securities be realized upon in order to ascertain the deficiency, if any, to be allowed as an unsecured claim, and to obtain for the benefit of the estate any surplus upon a foreclosure sale, assimilating the practice and procedure in matters of bankruptcy.

2. As to the Castle mortgage covering leaseholds and fee simple lands acquired by the mortgagor subsequently to the execution of the mortgage and after the expiration of the terms of the scheduled leases, whether the same were lands previously leased by the mortgagor or other lands, but used in connection with and as part of the mortgaged plantation, the plaintiffs contend that all such leaseholds and fee simple lands are included in the mortgage of the "plantation" with its "accretions and additions, * * * and all other species of property part and parcel thereof or to become parcel thereof," and that the second mortgagee recognized this by making two payments on the Castle mortgage as agent for Ahlo after the expiration of the leaseholds, as alleged. The second mortgagee denies this effect of these payments by it as such agent and contends that as to any of its mortgages taken prior thereto it had no legal or constructive notice of an incumbrance upon any of the lands which were originally leased and afterwards either purchased or newly leased, as well as newly acquired leasehold or fee simple lands.

The bill shows that the mortgagor up to the time of his death considered all the property connected with and used as a part of the plantation was covered by his mortgage to Castle, from

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time to time making payments thereon and otherwise acting on that theory, and the second mortgagee in making those two payments on the Castle mortgage as agent of Ahlo would naturally have been aware of the fact that Ahlo was so treating this mortgage. This, in equity, was enough to put the second mortgagee upon its inquiry which would not be confined to an examination of the records as to the particular lands constituting the plantation which the mortgagor had acquired subsequently to the expiration of the scheduled leases. The result of such inquiry would have shown the facts and precluded the second mortgagee from acquiring or assuming the position of a bona fide purchaser for value without notice of the prior incumbrance. But, irrespective of this phase of the question, the language and provisions of the mortgage show that it was intended to cover the "plantation" as a "going concern," which ordinarily would include all future acquired property essential and appropriate to that end.

With regard to the purpose and scope of the mortgage it will be observed that it covered, not only the "plantation" as it existed at the time the mortgage was executed, but also expressly covered all "additions and accretions thereto," as well as "all other species of property part and parcel thereof or to become parcel thereof." Thus contemplating that in the operation of the plantation the leases, from time to time, would expire, that tools and implements by reason of use would cease to serve their purpose, and that animals and all other property necessary and proper to continue and carry on the "plantation" would ordinarily in the nature of things, have to be renewed, replaced, added to, or newly acquired, otherwise the value of the "plantation" as a security would be greatly impaired if not destroyed. At all times it remained with all its additions the same "plantation." To thus read and construe this mortgage is reasonable and natural.

3. As to the question of multifariousness: By multifarious-

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ness in a bill is meant the improper joining in one bill of distinct and independent matters and thereby confounding them, as the uniting in one bill matters perfectly distinct and unconnected against one defendant, or uniting several matters of a distinct and independent nature against several defendants in the same bill. But a bill is not multifarious where one general right only is claimed by the bill though the defendants may have separate and distinct interests therein. Where the case presented by the bill is so entire that it cannot be prosecuted in several suits and yet each of the defendants is a necessary party to some part of the case as stated, neither of the defendants can demur for multifariousness or for misjoinder of causes of actions, in some of which he has no interest.

When the entire case cannot be prosecuted by separate suits against each defendant, and each is a necessary party in order to obtain the full relief sought, no defendant has cause to demur to the bill for multifariousness, or for misjoinder of causes on the ground that in some of them he has no interest.

The plaintiffs seek to establish their lien against the plantation and all property connected therewith, and the mere fact that in following the property the several defendants are required to disclose his or its acts concerning it, does not render the bill multifarious. One general right only is claimed by the plaintiffs though the defendants may have separate and distinct interests therein. The bill, as we view it, is not multifarious.

Carter v. Lane, 18 Haw. 10, 12, citing *Ohera v. Ackerman*, 9 Haw. 597, 599, is authority for the rule that a bill is not multifarious because "several species of relief may be prayed for although each might be the subject of a separate suit."

4. It is urged on behalf of the defendant, Haneberg, that the court in probate having power to require administrators to perform their trusts, equity has no jurisdiction to require an accounting from the administrator. Plaintiffs do not merely seek to obtain an accounting from the administrator but to pro-

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tect their lien on the property or its proceeds in his hands. Moreover, the bill alleges a conspiracy between the defendants Haneberg and H. Hackfeld & Co., Ltd., to deprive plaintiffs of their lien. These are matters concerning which the court in probate has no jurisdiction. The enforcement of the mortgage, or having it declared a superior lien, as well as requiring an accounting by Haneberg of his acts concerning the property which has come to his hands, and is subject to this lien, are matters within the jurisdiction of a court of equity.

5. Why W. R. Castle, trustee, has not actually assigned or does not now assign the mortgage to the Castle Estate does not appear. The assignment of the notes, however, of itself operated as a matter of law as an assignment of the mortgage and of the mortgagee's powers under it. W. R. Castle, trustee, is, therefore, improperly a party plaintiff. The bill is, however, amendable in that respect.

We are of the opinion that the bill states a cause relievable in equity, the plaintiff, the S. N. Castle Estate, Ltd., being entitled, inter alia, from the allegations of the bill, to a declaration that the mortgage of 1884 is superior as a lien to those of the defendant H. Hackfeld & Co., Ltd. The decree appealed from is, therefore, reversed and the cause remanded to the circuit judge with directions to proceed in accordance with this opinion.

Castle & Withington, Alfred L. Castle and G. A. Davis for plaintiffs.

Thompson, Clemons & Wilder, Henry E. Cooper and Smith, Warren & Hemenway for defendants.

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HENRY BICKNELL *v.* H. L. HERBERT, DEFENDANT,
WM. HENRY, WM. HENRY AS SECRETARY OF
BENTON G. MINING CO., GARNISHEES.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED APRIL 6, 1910.

DECIDED APRIL 14, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

JUDGMENT—*motion to set aside.*

Sufficiency of evidence to support a finding by a district magistrate cannot be inquired into on a motion to set aside judgment made six months after judgment.

PROCESS—*service by publication.*

Act 34, S. L. 1909, relating to service by publication, does not apply to district courts.

PROCESS—*substituted service—leaving at last place of abode.*

A and his family occupied a dwelling at Waikiki, Honolulu, and then left the Territory with intention of abandoning his residence in Hawaii and establishing a home in Australia. Subsequently he returned to Honolulu on business, remaining one month and occupying a room at 184 S. Hotel street. Held, the latter was his "last and usual place of abode" within the meaning of R. L., Sec. 2114.

CONSTITUTIONAL LAW—*due process of law—substituted service.*

The provision of R. L., Sec. 2114, for service on the principal defendant by leaving a copy of the summons at his last and usual place of abode meets the requirement of the Constitution as to due process of law.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit instituted in the district court of Honolulu for \$96 and interest, attorneys' commissions and costs. The declaration was dated June 30, 1909, and summons was issued the same day returnable July 2, 1909. Service of the summons was made on William Henry personally and as secretary of the Benton G. Mining Company, garnishee, on June 30, 1909. No personal service was made on the prin-

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principal defendant, who at that time was without the Territory of Hawaii; nor was there any service on him by publication. The only service which was made on the principal defendant was by leaving a copy of the summons at his last and usual place of abode. At the trial no appearance was made of or for the defendant. On July 2, the testimony of plaintiff and of William Henry having been received, judgment was rendered for the plaintiff against the defendant and the garnishee in the sum of \$134.57. No appeal was taken or writ of error sued out to review the correctness of the judgment. On December 31, 1909, the principal defendant, appearing specially for the purpose by Messrs. Castle & Withington as his attorneys, presented a motion to quash service and to set aside the judgment on the grounds: "(1) that on the face of the record there are not sufficient facts to warrant either a judgment against this defendant or against said garnishees; (2) that the said judgment against this defendant is erroneous and void, because the record shows that there was not sufficient service upon this defendant to comply with Article XIV of the Amendments to the Constitution of the United States or with the laws of the Territory of Hawaii; (3) that the said judgment was erroneously and inadvertently taken, in that no service was in fact made upon the defendant, either personally or at his last and usual place of abode, as provided by the laws of the Territory of Hawaii in regard to service in garnishee proceedings; and (4) that the said judgment, both against the defendant and the garnishee, is void and entered without authority of law."

The motion was based upon the records in this and three other actions brought against the same defendant and the same garnishee and upon the affidavit of one R. A. Jordan. At the hearing of the motion the plaintiff, also "appearing specially," challenged the authority of Messrs. Castle & Withington to appear for the defendant. The record is silent as to what proceedings, if any, were had with reference to this challenge.

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Subsequently the magistrate "denied defendant's motion as a whole." From that ruling defendant appealed to this court on points of law, the points being substantially those stated in the motion to quash.

In view of our conclusion on the other issues it is unnecessary to pass upon the question of counsel's authority to appear. It may be assumed in the defendant's favor that Messrs. Castle & Withington had the requisite authority.

Whether the evidence adduced was sufficient in law to support the judgment against the garnishee is a question which cannot be raised by the motion to set aside the judgment presented six months after judgment. At least two methods were open to defendant for obtaining a review of the finding against the garnishee, that is, by appeal and by writ of error. It may be added, although perhaps it is not material, that at the date of the filing of the motion to set aside the judgment the time for suing out a writ of error had not expired.

Sec. 2114 of the Revised Laws, after prescribing the method of bringing the garnishee before the court, provides that "such notice" (summons) "shall be sufficient notice to the defendant to enable the plaintiff to bring his action to trial unless the defendant be an inhabitant of this Territory or has some time resided therein, and then a like copy shall be served personally upon him or left at his last or usual place of abode." Service on the defendant was made under this section. It is now contended on his behalf that it should have been made under Act 34 of the Laws of 1909, amending Sec. 1723 of the Revised Laws and reading as follows:

"If the defendant was never an inhabitant of the Territory or has removed therefrom, or if after due diligence he cannot be found within the Territory of Hawaii and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof at Chambers, and it shall in like manner appear that a cause of action exists against such defendant or that he is a necessary or proper party to the action, and that such defendant

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has property situated within the Territory of Hawaii, such court or judge may grant an order that the service be made by publication of the summons."

Sec. 1723 R. L., as thus amended does not in our opinion apply to proceedings before district magistrates. The language used concerning "the court or a judge thereof at chambers" would be inappropriate if used with reference to district courts. District magistrates do not under our statutes sit "at chambers." It is Sec. 2114 that applies in such cases as that at bar.

The officer's return of the service made on the defendant was as follows: "Due and diligent search has been made for the within named H. L. Herbert, defendant, within the district of Honolulu, city and county of Honolulu, T. H., and he cannot be found. Upon information received said H. L. Herbert is now without the Territory of Hawaii. I therefore served defendant herein by leaving a true and attested copy thereof at his last and usual place of abode, to wit, at Mrs. Kearns, 184 S. Hotel street, Honolulu, this 2d day of July, 1909." On defendant's behalf it is contended that 184 S. Hotel street was not in truth the "last and usual place of abode" of the defendant, and in support of this contention reliance is had upon the affidavit of R. A. Jordan. If the correctness of an officer's return may be attacked at the time and in the manner in which this return is attacked, as to which no opinion is expressed, there is nothing in the affidavit to contradict the return. Jordan deposes that defendant is a married man with a family; that with his family he left Honolulu for Australia on August 22, 1908, "intending to make Australia his home;" that defendant and his family "have since been residents of Sydney, N. S. W., Australia;" that defendant "returned alone, without his family, on a business trip," on January 7, 1909, again leaving Honolulu for Australia on February 7, 1909, and has not since been within the Territory of Hawaii; that from January 7, 1909, to February 7, 1909, defendant "had a room at Mrs. Kearns at 184 S. Hotel street in said Honolulu, but that

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his family had never lived or had their usual place of abode at said Mrs. Kearns at 184 S. Hotel street, but that the last and usual place of abode of said defendant within this Territory was at Waikiki." A place of abode within the meaning of Sec. 2114 is something less permanent with reference to its occupancy than a place of residence or a domicile. The latter terms as sometimes used in statutes signify a fixed home accompanied by an intention to remain for an indefinite time; but it is possible for one to have for a limited time a place of abode separate and distinct from his permanent residence or domicile. Upon the facts stated in the affidavit, the residence at Waikiki was wholly abandoned when defendant and his family departed for Australia, and when during the whole of the time of his subsequent visit to Honolulu the defendant occupied a room at 184 S. Hotel street, the latter became his last and usual place of abode. The requirements of Sec. 2114 were sufficiently complied with.

The summons was made returnable two days after the date of its issuance and in that respect complied with the requirements of R. L. Sec. 1705, that "All original writs shall be returnable not less than one nor more than six days from the date of issue."

The defendant's main contention is that the service prescribed by Sec. 2114 is not sufficient to meet the requirements of Article 14 (Article 5, perhaps, was intended) of the amendments to the constitution, securing to all persons "due process of law" in the taking of property. Notice and an opportunity to be heard are, of course, of the essentials of due process of law. When a judgment purely in personam is sought, personal service upon the defendant is indispensable; but when the proceeding is in rem or quasi in rem substituted service will suffice. A garnishment such as that in the case at bar, where the object sought is to apply the property of the defendant, to wit, the debt due to him by a third party, to the satisfaction

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of his debt to the plaintiff, is a proceeding quasi in rem within the meaning of this rule. The state has the power to subject the property of a defendant, nonresident though he be, to the payment of debts due to its citizens, and in the exercise of that power "substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." *Pennoyer v. Neff*, 95 U. S. 714, 727. Leaving a copy of the summons at the last and usual place of abode of the defendant is one of the modes of service authorized by our law and is a mode prescribed by the statutes in many of the states and has long been deemed to be well calculated to give to a party alive to the protection of his property and to the performance of his duties notice of the institution of the proceeding against him. Notice by publication is, perhaps, a method more often used as a substitute for personal service, but there is no distinction in principle between the one method and the other. Neither is based on the theory that it will necessarily give actual notice to the defendant but merely that it will give such notice to himself or to his agents if he cares to take reasonable precautions for the protection of his property. A non-resident leaving credits or other property within the jurisdiction is charged with a knowledge of the law as to what the procedure will be when the state attempts to apply those credits or that property to the payment of his debts.

On this general subject see also *Cooper v. Reynolds*, 10 Wall. 308, 317, 318, 319; *Earle v. McVeigh*, 91 U. S. 503, 504; *Huling v. Kaw Valley Railway*, 130 U. S. 559, 563, 564; *Arndt v.*

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Griggs, 134 U. S. 316, 321; *Dewey v. Des Moines*, 173 U. S. 193, 203; *Hartzell v. Vigen*, 6 N. D. 117, 130, 131; *Paper Company v. Shyer*, 108 Tenn. 444, 451, et seq.; *Douglass v. Insurance Co.*, 33 N. E. 938, 939, 940; *The Mary*, 9 Cr. 126; *Dillon v. Heller*, 39 Kans. 599; *Matter of the Empire City Bank*, 18 N. Y. 199, 215, 216; *Journey v. Dickerson*, 21 Ia. 308, 311, 312; and *Byrne v. Allen*, 10 Haw. 668.

In our opinion the service provided for by Sec. 2114 meets the requirements of due process of law.

The judgment denying the motion is affirmed.

C. F. Peterson for plaintiff.

Castle & Withington for defendant.

GEORGE E. SMITHIES, TRUSTEE OF STELLA KEO-MAILANI COCKETT, AND STELLA K. COCKETT, BENEFICIARY, *v.* JOHN F. COLBURN, EXECUTOR UNDER THE WILL OF DAVID KAWANANAKOA, DECEASED, AND JONAH KALANIANAOLE.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 15, 1910.

DECIDED APRIL 21, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

PARTIES—*capacity to sue.*

A new trustee can join with the beneficiary in bringing an action on a judgment in favor of the beneficiary and the former trustee who had assigned the judgment to him "as far as I am authorized so to do."

JUDGMENT—*effect upon one judgment debtor of release of another.*

A release by operation of law of one judgment debtor upon a ground not applicable to the other does not operate to release the other.

JUDGMENT—*executors and administrators.*

Upon the death of one judgment debtor the other succeeds to the joint obligation of the judgment, and he is liable alone and

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not jointly with the executors or administrators of the deceased judgment debtor. The executors and administrators are not liable at law in such case.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff in error, referred to in this opinion as the defendant, was a codefendant in the court below. The other defendant did not join in the petition for the writ and did not join issue having obtained a separate judgment in the court below and not being further concerned in the case.

This was an action on a judgment recovered in the circuit court by Albertina Polyblank, trustee for Stella Cockett, and Stella Cockett against David Kawananaoka and Jonah Kalaniana'ole for the sum of \$5,280.75, besides interest and costs, being the amount of the deficiency found to be owing upon the foreclosure of their mortgage to the trustee. The judgment was affirmed on successive appeals (17 Haw. 82; 205 U. S. 349), and the trustee resigning the plaintiff George Smithies was appointed by the court as trustee in her place. David Kawananaoka having died and John F. Colburn being executor of his will, the judgment claim was presented to him and rejected. Thereupon the new trustee and the beneficiary brought this action. The executor demurred to the declaration on the ground that it did not state facts sufficient to constitute a cause of action against him or the estate of the decedent and that the action was not brought within two months after the claim was rejected, being the time limited by statute for actions against executors on claims rejected by them. The defendant Jonah Kalaniana'ole demurred on the grounds that the declaration did not state facts sufficient to constitute a cause of action against him solus or conjointly with the executor. The executor's demurrer was sustained and he took judgment on the order sustaining the demurrer. The demurrer of the defendant Jonah Kalaniana'ole was overruled and after excepting to the

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order overruling it he answered. At the hearing, to which he excepted, relying on his demurrer, jury being waived, he admitted the averments in the declaration except the averment that the executor arbitrarily rejected the claim and judgment against him was entered for the plaintiffs in the sum of \$6,086.15 and \$26 costs.

The defendant's claim, presented in various forms in his assignment of errors, is that his demurrer ought to have been sustained on the ground that a release of one judgment debtor releases the other. In his reply brief he claims that the demurrer ought to have been sustained on the ground that a judgment is not assignable at law and that if it is assignable under the statute the beneficiary should have joined in the assignment. The declaration avers the resignation of the former trustee, the appointment of the new trustee by the court and that the judgment was duly assigned by her to the plaintiff Smithies.

A demurrer on the ground that the plaintiff has no legal capacity to sue cannot be sustained unless it appears on the face of the complaint that he has not such capacity. *Barkley v. Quicksilver*, 6 Lans. 25. A plea in abatement "is the proper mode of taking advantage of the objection." 1 Chit. Pl., 16 Am. Ed. 464; 31 Cyc. 324. There is the further difficulty in considering this objection that it is not specified in the demurrer. At common law, after the statute of the 27 Eliz. c. 5, defects in form must be pointed out specially and judgment could not be reversed on error for any "imperfection, defect or want of form" unless "specially and particularly set down and expressed" in the demurrer. 1 Chit. Pl. 695. If the objection is properly before us, its force is not apparent since the beneficiary retains her interest in the judgment and the trustee assigned, as expressed in Exhibit A in the record, "so far as I am authorized so to do." A judgment is assignable as a non-negotiable chose in action. Sec. 1739 R. L.

This is, as treated by each of the parties, a joint judgment.

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The dictum in *Bowler v. McIntyre*, 9 Haw. 306, that a judgment is joint and several is made upon the authority of Black on Judgments, Sec. 210, which is supported by decisions based on statute.

If one of two or more persons bound by their joint obligation is released from it by the obligee the obligation is not enforceable against either of the others for the simple reason that it was not a several obligation. And so the obligation of a judgment imposed by law upon two joint judgment debtors is discharged by release of one of them by the judgment creditor or by his release by operation of law on grounds applicable alike to the other judgment debtor. If, however, one judgment debtor avoids the effect of the judgment not by a release by the judgment creditor nor upon a ground equally applicable to the other the latter is still bound. "But judgment recovered by one of several joint debtors, is not a defense to a subsequent action against the others, unless it be shown that the judgment was recovered on a ground which operated as a discharge of all." 2 Chit. Contr. 1176. "Judgment in favor of one co-obligor would extinguish the obligation against the others unless obtained in consequence of a defense applying peculiarly and alone to a party in whose favor it had been obtained." *Hunt v. Terri's Heirs*, 30 Ky. 68.

It was held in *Phillips v. Ward*, 2 H. & C. 716, that "A judgment recovered by one of several joint debtors cannot be pleaded as a defense to a subsequent action against the other joint debtors in respect of the same cause, unless a plea shows that the judgment was recovered on a ground which operated as a discharge of all," Bramwell, B., saying: "No doubt if a person jointly liable with others succeeds in an action against him alone by pleading a release or payment, that would afford a good defence to an action against the other joint debtors—whether pleaded in bar or by way of estoppel seems unimportant—for a release to one is a release to all, and payment by one is

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a discharge of all. Therefore, in some cases, a judgment recovered by one of several joint debtors may be pleaded in an action against the others. But this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors; but only that the Court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency;" Channell, B.: "The defendants plead a judgment recovered by a joint debtor in a former action for the same cause; and I think it incumbent on the defendants to show by their plea that the judgment in that action is inconsistent with their liability in this action. But, so far as this plea states, the judgment for the defendant in the former action may have proceeded on a ground which, though affording a perfect defence as regards him, does not affect the liability of the present defendants." (p. 719.) "When a suit is commenced against several joint debtors, upon a joint contract, and one of them pleads or gives in evidence a matter which is a bar to the action, as against him only, and of which the others cannot take advantage, as it respects them, there can be no good reason why the plaintiff should not be at liberty to proceed to take judgment against them." *Hartness v. Thompson*, 5 Johns. 160, 161. And see *Hill v. Morse*, 61 Me. 541, 543. "A mere discharge by operation of law of one of several debtors without the consent of the creditor will not take away his remedy against the others." 2 Chit. Pl. 455. "The common rule is that on the death of one joint promisor the surviving promisors alone remain liable" and that "any cause operating to discharge the right of action against one of several joint promisors will discharge all of them except where one receives a purely personal discharge as in bankruptcy or by a covenant not to sue." Harriman, Contr. Secs. 353, 354.

In *Conn. Fire Ins. Co. v. Oldendorff*, 73 Fed. 88, cited by the defendant, separate judgments on a joint contract had been

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entered on different days in favor of the defendants. The court dismissed the plaintiff's writ of error to review the judgment last entered because the six months allowed to bring the writ had elapsed in respect of the earlier judgment, holding that the failure to bring the writ seasonably required its dismissal in respect of one judgment as well as the other as equivalent to a release "by operation of law and at the instance and by the act of the creditor." If the decision is inconsistent with the authorities above cited we decline to accept its authority.

The defendant Jonah Kalaniana'ole was not released from the joint obligation of the judgment against himself and David Kawanana'koa by reason of the release of the executor of the will of David by operation of law although the release was based on the plaintiff's delay to bring the action in two months after the claim against the executor was rejected. The release in no way affected the sole obligation, which rested upon Kalaniana'ole upon the death of the other obligor. From the nature of a joint obligation personal representatives of obligors are not liable severally as long as there is a surviving obligor. The death of a joint obligor does not extinguish the obligation of the surviving obligor. As joint property goes to the surviving owner and not to the heirs or representatives of the deceased, so a joint obligation becomes that of the survivor. Joint liability is an entirety and a cause of action for breach of a joint contract does not survive against the representatives of a deceased joint contractor because of the nature of such contracts and of the mutual rights of joint contractors.

"In case of a joint contract, if one of the parties die, his executor or administrator is at law discharged from liability, and the survivor alone can be sued." 1 Chit. Pl. 58. "In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued." 3 Williams on Executors, 1842. "If one

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of several joint contractors dies, the survivors must be sued to the exclusion of the personal representatives of the deceased." 2 Chit. Contr. 1356. See also *Harrison v. Magoon*, 13 Haw. 339, 353. "The consequence of which" (survivorship of joint ownership) "is, that, where two or more persons are parties on the same side, and the promise by or to them is joint,—the ordinary case of a joint contract,—the death of one joint party transmits both his interest and his burdens, not to his administrator, but to his living fellow parties on the same side with himself. They may sue or be sued on it; but the administrator can neither be joined as a party with them, nor sue or be sued alone." Bish. Contr., Sec. 683.

Ashbee v. Pidduck, 1 M. & W. 564, was an action on a joint bond in which it was held that a release given by the obligee to the representative of one of the deceased obligors was not "a release to the surviving obligor, as on the death of one it survived to the others," and "no action could be maintained" against the executor.

The plaintiffs' claim, therefore, that even if their action had been brought within the two months required for actions against executors and administrators the executor could not have been held, must be sustained.

We see no merit in the defense that the plaintiffs by bringing the action against the executor and himself jointly are thereby precluded from taking judgment against himself as sole defendant on the theory that having made their election they must stand or fall upon it, or that there can be but one judgment on the pleadings for or against both defendants. "To seek a remedy against a wrong person does not deprive a plaintiff of his remedy against the right party." *Dumois v. New York*, 76 N. Y. Suppl. 161, 164. "If the suitor has in his first action mistaken his remedy and adopted a mode of redress incompatible with the facts of his case and is defeated on that ground he is still free to elect to proceed anew." 7 Enc. Pl. & Pr.

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367, and see 15 Cyc. 262. "Whenever a defendant pleads matter which goes to his personal discharge, or any matter that does not go to the nature of the writ, or pleads or gives in evidence a matter which is a bar to the action against himself only, and of which the others could not take advantage, judgment must be for such defendant and against the rest." 11 Enc. Pl. & Pr. 850.

The plaintiffs' declaration upon a joint liability did not preclude them from recovering upon a several liability. It was not requisite to amend the pleadings or to discontinue and bring another action.

Judgment affirmed.

R. P. Quarles (*Atkinson & Quarles* on the brief) for plaintiffs.

C. W. Ashford for defendant.

NO. 50. S. N. CASTLE ESTATE, LIMITED, AND W. R. CASTLE, TRUSTEE, v. A. HANEBERG, ADMINISTRATOR OF THE ESTATE OF L. AHLO, DECEASED, H. HACKFELD & COMPANY, LIMITED, AND KANEOHE RICE MILL COMPANY, LIMITED. Appeal from circuit judge, first circuit. Petition for rehearing. Filed April 21, 1910. Decided April 25, 1910. Hartwell, C.J., Perry and De Bolt, JJ. Per curiam: The grounds of the petition are that the court inadvertently failed to determine whether a second mortgagee in proceeding to foreclose should first pay off the first mortgage and whether the foreclosure of the Hackfeld mortgages was illegal or void. The omission was not through inadvertence. The court held that the earlier mortgage covered certain after-acquired property which was also included in the junior mortgages and that upon the allegations of the bill the S. N. Castle Estate, Limited, was entitled to a declaration that the mortgage of 1884 is superior as a lien to those of H.

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Hackfeld & Co., and in effect sustained the bill as one to remove a cloud from title. Having found that, to this extent at least, there was equity in the bill, it was unnecessary to decide, on the demurrers, the two questions above mentioned or to determine what other relief, if any, could appropriately be granted. Subsequent developments may render it unnecessary to pass upon these precise issues at all or, if they do not, the court may be in a better position to determine them after the hearing in the light of the evidence adduced. The petition is denied without argument under Rule 5.

Castle & Withington, Alfred L. Castle and G. A. Davis for complainants.

Thompson, Clemons & Wilder and Smith, Warren & Hem-enway for respondents.

HENRY VAN GIESON v. J. ALFRED MAGOON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 22, 1910.

DECIDED MAY 4, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

Contracts—construction.

The agreement of the defendant with the plaintiff required him to defend the plaintiff's case to the court of last resort to which the same might be appealed.

Champerty and maintenance—agreement of an attorney at law to defend a case for a share of the property involved in it.

Such an agreement is not illegal or void by the law of Hawaii.

Attorney and client—refusal to accept attorney's advice to compromise.

An attorney is not discharged from an agreement to defend his client's case by the client's refusal to accept the attorney's advice to compromise.

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Evidence—reasonableness of attorney's fees.

The reasonableness of fees charged by an attorney must be shown by evidence in addition to a showing of the kind of service performed.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action to recover \$626.07 expended by the plaintiff for costs and attorney's fees in the appeal to the United States supreme court from a decree in this court in a suit in equity brought against him by one Maile to obtain a reconveyance of certain land that plaintiff had bought at an execution sale. The plaintiff appointed the defendant as his attorney in the suit and made an agreement with him October 19, 1906, that the defendant, in consideration of the plaintiff's conveyance to him of a portion of the land, would defend the suit and pay the costs. The decree made by the trial court in favor of Van Gieson was reversed by this court. The defendant declined under his agreement to appeal the case to the United States supreme court, whereupon the plaintiff engaged another attorney for the purpose paying \$309.42 attorney's fees, \$313.10 costs of court, \$22.50 for printing brief and \$7.05 for cabling in the case. The defendant paid only \$25 of the costs on appeal. The plaintiff claimed at the trial that the agreement was ambiguous or equivocal in its expression of the duty of the defendant to attend to an appeal from the decree of this court, and for that purpose introduced parol testimony tending to show that the defendant admitted that it required him to do this. The jury rendered a verdict for the plaintiff for the amount claimed. Exceptions were taken by the defendant to the admission of the evidence explanatory of the written agreement, denial of his motion for a directed verdict, refusal of the court to instruct the jury in accordance with his theory of the case, namely, that the agreement was unambiguous and clear, requiring no appeal by Van Gieson to be taken

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beyond this court to the instructions given to the effect that the evidence was admissible in order to explain an "equivocation" which the court found in the agreement, and to denial of motions for judgment non obstante and for a new trial.

The defendant submits that the agreement is void for champerty. This was presented as one of the grounds of the motion for judgment non obstante. It appears to be of a champertous nature which would make it illegal and void at common law. In *Mossman v. Hawaiian Government*, 10 Haw. 421, 434, 435, 436, the court held that it "is at least questionable" whether a conveyance by a disseizee to a third party is void as to the disseizor by the common law of England as ascertained by English and American decisions, but that "the doctrine contended for, if common law, is within the exception of the statute as otherwise fixed by Hawaiian judicial precedent or established by Hawaiian national usage." In *Pechell v. Watson*, 8 M. & W. 690, the syllabus mentions maintenance as "a wrongful act at common law," and the statutes relating to maintenance as "declaratory of the common law," but this statement does not appear in the opinion. "It has always been considered, however, that champerty and maintenance are offences at common law and that the statutes only declare the common law, with additional penalties (*Pechell v. Watson* (1841), 8 M. & W. 691; *Partridge v. Strange* (1552), Plowden, 77, 88)." Laws of England (1 Halsbury) 52. "This was an offense at the common law." 2 Coke's Littleton, 368. b. The *Mossman* case may, however, rest safely upon the ground that the common law on the subject of livery of seizin never prevailed here. It was said in *Henrique v. Paris*, 10 Haw. 408, 413, with reference to the common law rule of the non-assignability of a right of entry: "There is not now and here the necessity that there was in England in the Middle Ages for laws against champerty and maintenance to prevent the stirring up of suits for purposes of oppression, nor any

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reason why a landlord should not convey his estate without the consent (attornment) of his tenant. Freedom rather than restraint of alienation is required under present conditions. The reasons for this rule having ceased, the rule itself should also cease." Since that decision non-negotiable choses in action have been made assignable by statute. Sec. 1739 R. L.

The conditions of society under which the law of maintenance and champerty originated no longer exist. The common law of England is declared to be the law of Hawaii "except as otherwise expressly provided by the Constitution and laws of the United States, or by the laws of the Territory of Hawaii, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." Sec. 1 R. L. That portion of the law of champerty which relates to the assignability of choses in action and conveyances by disseizees is otherwise provided for and fixed by precedent and usage and in part by legislation.

The contract is not unlawful because against principles of law in force here, nor is it a contract to do anything which is prohibited by statute or which is immoral. There is no generally acknowledged public policy against such contracts. Probably more frivolous and groundless suits are brought without any agreement for attorney's fees than under such agreements. If an attorney undertakes to pay the costs he is more likely to do so in a meritorious case than in one devoid of merit. If he takes advantage of his superior knowledge and of the client's poverty to obtain an unfair arrangement for sharing in the proceeds of the litigation the client's remedy at law or in equity is ample.

It is not the practice of attorneys of recognized standing to encourage frivolous litigation. We believe that the "ambulance attorney" is not yet in evidence here and it is to be hoped that he never will be. But the promoter and stirrer up of strifes may at any time exist and is not abated by laws of maintenance and champerty.

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The objection to the agreement that it is illegal and void for champerty is not sustained.

We will next consider the meaning and legal effect of the agreement which is worded as follows:

"That said Van Giesen hereby appoints said Magoon and such persons as he may substitute for him or associate with him, attorney or attorneys in the case of C. B. Maile against said Van Giesen and another now pending in the circuit court of the first judicial circuit.

"In case said suit is decided in favor of said Van Giesen in the court of last resort to which the same may be appealed, he shall deed to said Magoon all of the land on Alakea street in Honolulu, Oahu, purchased inter alia by him at sheriff's sale on judgment recovered for taxes against said Maile, said land to be free from all encumbrances made or suffered by said Van Giesen; and upon the delivery of said deed to said Magoon, he shall pay the said Van Giesen five hundred and thirty-five dollars with interest thereon at the rate of eight per cent per annum from the 5th day of July, 1904. Said Van Giesen is to forthwith execute a deed of said land to said Magoon and deliver the same to J. Lightfoot, he to hold it in escrow until the termination of said suit. And in case it shall be terminated in favor of said Van Giesen, to deliver to said Magoon said deed upon the payment by him of said sum of five hundred and thirty-five dollars with interest thereon as aforesaid.

"Said Magoon is to defend free of charge said pending suit and any other suit that may be brought by said Maile or any one claiming under him, and in case judgment shall be against said Van Giesen, shall appeal the same to the Supreme Court of this Territory, and in case judgment shall be in favor of said Van Giesen in the trial court and shall be appealed by the adverse party, said Magoon shall defend such suit to the court of last resort to which the same may be appealed. Said Magoon is to pay all costs of court that shall accrue after this date against said Van Giesen in said pending suit.

"Said Magoon agrees in case said pending suit shall be finally decided in favor of said Van Giesen to pay to said Van Giesen three-quarters of the rents now due from said Magoon, on account of said land, provided said suit shall not be appealed further than to the Supreme Court of the Territory of Hawaii,

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and one-half of such rents in case said suit shall be appealed to the United States Supreme Court.

"Said Magoon agrees to pay the mortgage notes for three hundred and fifty dollars and one hundred and sixty dollars heretofore given by said Van Gieson and take an assignment of said notes and the mortgages secured thereby in case the mortgagees shall attempt to force payment of the same provided said Van Gieson shall keep the interest of said mortgage promptly paid; and in case of such assignment to said Magoon, he will hold the same, provided the interest shall be paid as aforesaid until the final determination of said pending suit."

The plaintiff's object in entering into this agreement was to hold the title obtained at the execution sale as against the claim of Maile "or any one claiming under him," and the defendant was interested in securing for the plaintiff this land of which he was to have a part deeded to him by the plaintiff for the professional services of himself "and such persons as he may substitute for him and associate with him" in defending the suit and for "all costs of court that should accrue against Van Gieson in said pending suit," which the defendant was to pay. Under such circumstances an agreement to defend the suit generally would not be limited to its defense in the trial court. In other words, this would not be like a retainer for that court only requiring a further retainer on appeal whether by one side or by the other. There is no reason why in an agreement to defend the suit the defense should stop with an adverse decree in this court any more than with an adverse decree by the trial court. There is nothing in the prior or subsequent parts of the agreement which limits the defense to any court in which it could be made. The provision requiring an appeal to this court from a judgment against Van Gieson and that Magoon shall "defend such suit to the court of last resort to which the same may be appealed," if Van Gieson should obtain judgment in the trial court and Maile should appeal, does not limit the defense to those instances, especially when the

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object of the entire agreement is considered and that Magoon agreed to pay all costs that should accrue against Van Gieson. To defend a suit means in popular and well understood phrase to take care of it in court. One who is not an attorney at law would take care of or defend a suit by engaging an attorney to do all that the law authorizes him to do in caring for the interests of the party whose rights in the suit are entrusted to his care. This is not done without resorting to the customary methods of asserting such rights whether by appeal, writ of error or exceptions. If the parties intended that the suit should not be fully defended such intention should have been expressed by a provision that the attorney would defend the suit in the trial court and in this court only. The requirement of an appeal to this court by Van Gieson and of a defense "to the court of last resort," in case of an appeal by Maile, does not imply that an appeal would not be taken by Van Gieson from an adverse judgment of this court. By the agreement Magoon was to pay Van Gieson three fourths of the rent then due on account of said land "in case said pending suit shall be finally decided in favor of said Van Gieson," if the suit should "not be appealed further than to the supreme court of the Territory of Hawaii, and one-half of such rents in case such suit shall be appealed to the United States Supreme Court," plainly contemplating an appeal to the court of last resort. Magoon's agreement to pay Van Gieson's mortgage notes for \$510 and take an assignment of them and of the mortgages if the mortgagees should attempt to force payment, conditioned upon Van Gieson keeping the interest paid, required and authorized him to "hold the same provided the interest shall be paid as aforesaid until the final determination of said pending suit," another recognition of the fact that a final appeal was contemplated. These provisions are equally applicable to appeals to the United States supreme court by Van Gieson as by Maile.

Magoon agreed to defend the suit against Van Gieson, which

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is described as the one which was pending in the circuit court of the first judicial circuit, Van Gieson deeding to him a portion of the land for which the suit was brought, the deed to remain in escrow until the termination of the suit. Magoon was to defend free of charge that suit and any other which might be brought by Maile or any one claiming under him, and (1) if Van Gieson should lose in the circuit court he was to appeal the case to the supreme court of the Territory, and (2) if Van Gieson should win in the circuit court and Maile appeal Magoon was to defend it to the court of last resort to which the case might be appealed, namely, the United States supreme court. The contingency of Van Gieson winning in the circuit court and Maile appealing to the territorial supreme court implies that Maile might win and Van Gieson appeal to the United States supreme court. If, however, Van Gieson should win and Maile appeal to the United States supreme court would Magoon's agreement to defend the suit not require him to defend it in Washington? It is difficult to see how the case could be defended if the defense should be confined to the instances enumerated above.

Taking into consideration then the object of the agreement and of its provisions we think that it required Magoon to conduct Van Gieson's appeal to the supreme court of the United States and to pay all the costs of court therein. This view of the agreement dispenses with consideration of the admissibility of evidence to explain its meaning or of the correctness of the instructions given in the view that the agreement contained an "equivocation," since the error of admitting the evidence and giving the instructions was not prejudicial to the defendant, for the only alternative would have been, upon rejecting the evidence, to instruct the jury that the agreement required the defendant to conduct and pay the expense of the appeal. It follows that the instructions on the parol evidence rule asked by the defendant were properly refused.

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The defendant claimed that he was released from any agreement to conduct an appeal to the United States supreme court by reason of the plaintiff's refusal to take his advice to accept a compromise of \$1800 offered by Maile. But the duty of an attorney to carry out an agreement to defend a case is not discharged because his advice to compromise it is not taken.

The defendant further claimed that there was no evidence of the value of the services of the attorneys engaged by the plaintiff. The plaintiff's right was to engage another attorney to perform the service which the defendant had agreed but declined to perform and the defendant would be liable for any reasonable expenditure incurred for the purpose. The reasonableness of the attorney's fees would not be determined by the result of the case nor be affected by a showing that another attorney would have charged a lower fee.

The declaration is in code form and its caption does not set forth the name of the action, *indebitatus assumpsit*, upon the defendant's agreement, implied by the law, to recoup the plaintiff for his reasonable expenditure in securing the agreed defense. It was not a question of the value of the professional services for which the plaintiff paid, but simply whether they were reasonable in amount. In addition to the showing of their payment and of the kind and nature of the service performed, namely, preparing a brief in the case, it was requisite in the opinion of a majority of the court that there should be evidence that the fees were appropriate for such services.

Unless the sums paid for attorney's fees, amounting to \$300, shall be remitted by the plaintiff within five days a new trial is granted. The exceptions relating to the fees are sustained.

Lorrin Andrews for plaintiff.

A. S. Humphreys for defendant.

CONCURRING OPINION OF PERRY, J.

I concur in the foregoing opinion, but on two of the subjects under consideration shall state more at length my reasons for my concurrence.

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Defendant's undertaking was that he would conduct the case for Van Gieson in the suit of *Maile v. Van Gieson* (whether he so undertook to appear until the final disposition of the case in the supreme court of the United States or only until a decision by the supreme court of the Territory is immaterial in this connection) and to pay all of the costs of the suit,—to lose all of such expenditures of money as well as his efforts and services in the event of an adverse judgment and in the event of success to receive as compensation for his services and for the risk incurred in the payment of expenses a portion of the land involved in the original suit.

Champerty and maintenance have been variously defined in the books, ancient as well as modern. Courts and text writers seem to have found some difficulty in stating precisely what they consisted of in England. Perhaps the following definition comes as near as possible to stating the generally accepted view on the subject. Champerty (*campum partire*, to divide the land) is "a bargain with a plaintiff or defendant in a suit for a portion of the land or other matter sued for in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense."—Bouvier. Maintenance is "a malicious or at least officious interference in a suit in which the offender has no interest, to assist one of the parties to it against the other with money or advice, to prosecute or defend the action without any authority of law."—Bouvier.

There were old English statutes defining champerty and maintenance and making them punishable offenses. Whether or not and to what extent champerty and maintenance were offenses under the unwritten law of England existing prior to the enactment of those statutes is a matter upon which the authorities are not agreed or at least some doubt is expressed here and there that they were offenses. The supreme court of the United States, in *Peck v. Heurich*, 167 U. S. 624, 629, 630, said: "According to the common law as generally recog-

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nized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void as tending to stir up baseless litigation." The preponderance of authority is, perhaps, to the effect that the rule was a part of the unwritten law of England. However that may be, it may, in view of our conclusion that these provisions of the common law, whether unwritten or statutory, are not, as such, in force in this Territory, be assumed for the purposes of this opinion that the rule was a part of the unwritten law.

So, also, for the same reason, it is unnecessary to determine in this case whether the "common law" of England which by Sec. 1 of the Revised Laws is made law in Hawaii includes early English statutes such as those mentioned above. In *Rooke v. Queen's Hospital*, 12 Haw. 375, 380, the court suggested the possibility of the question but expressed no opinion upon it. No definite decision upon it has been rendered as far as I know.

Before considering whether or not the common law of England relating to champerty and maintenance in general and to contracts such as that under consideration in particular is by reason of the provisions of Sec. 1 of the Revised Laws in force in this Territory, it may be well, assuming for the moment that such is not the case, to consider whether as a matter of public policy such contracts ought to be declared void.

In olden England such contracts were deemed to be contrary to sound public policy because it was believed that if they were permitted the result would be to encourage and facilitate the stirring up of unworthy litigation. Various considerations contributed to this view. In the first place, judges as a rule

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were more or less corrupt and the administration of justice was in disrepute. It was believed that powerful lords could and did control the judges and influence judicial decisions in their favor irrespective of the merits of controversies. The position of attorneys, too, was materially different then from what it is now. They were not supposed to receive any compensation as such for their services but merely an honorarium or gift at the option of the client. Attorneys could not demand or expect to receive pay as a matter of right. They were not permitted to make any contract whatsoever with their clients. It was deemed to be for the best interests of the community that the powerful lords owning large landed estates should continue in the ownership and possession of such estates and that others should not acquire title to any part of such property. The discouragement of litigation against the lords was for that as well as for other reasons regarded as desirable. The assignment of choses in action was also prohibited. It was largely for these reasons that the rule grew up and was finally embodied in statutes prohibiting any sort of intermeddling in the law suits or causes of action of others. The discouragement in the beginning went as far as to prohibit an offer voluntarily to testify in a pending suit, aid to a litigant to find a lawyer, and friendly advice to a neighbor as to his legal rights (*Gilman v. Jones*, 5 So. 785, 787), as well as the furnishing of money for the conduct of the suit and the undertaking to bear the expenses and to furnish professional services as attorney in consideration of a division of the amount to be recovered.

In some of the states, by reason of provisions of their fundamental laws, the common law rule on this subject has been declared to be the law in those jurisdictions. In still other states where the common law has been held as such not to be in force, the same rule in milder and modified form has been declared to exist as a requirement of public policy. In these the argument generally indulged in is, in brief, that to permit

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attorneys to make such contracts is to facilitate litigation, to encourage the bringing of groundless suits and to compel defendants to make unjust compromises. In the older English decisions the attorneys so conducting suits are referred to as "pests of society" (4 Blackstone's Com., p. 135) and the reasoning in the class of American decisions last referred to seems to proceed very largely upon the view that attorneys are such pests and unworthy of a reasonable amount of confidence and trust.

This reasoning does not appeal to me. I recognize that a majority, perhaps a great majority, of the state courts have taken the view that such contracts are contrary to public policy. *Key v. Vattier*, 1 O. 132, 143; *Boardman v. Thompson*, 25 Ia. 487; *Adye v. Hanna*, 47 Ia. 264; *Gammons v. Johnson*, 76 Minn. 76; *Moreland v. Devenney*, 72 Kans. 471; *Thurston v. Percival*, 1 Pick. 415; *Martin v. Clarke*, 8 R. I. 389, 401; *Re Evans & Rogers*, 22 Utah, 366; *Allard v. Lamirande*, 29 Wis. 502; *Hamilton v. Gray*, 31 Atl. (Vt.) 315; *Lytle v. State*, 17 Ark. 609, 663; *Gilman v. Jones*, *supra*. I prefer the reasoning of the minority. *Hassell v. Van Houten*, 39 N. J. Eq. 105, 109; *Schomp v. Schenck*, 40 N. J. L. 202; *Manning v. Sprague*, 148 Mass. 18, 20; *Bentinck v. Franklin*, 38 Tex. 458, 472-474; *Mathewson v. Fitch*, 22 Cal. 86, 94; *Reece v. Kyle*, 49 O. St. 475, 480-488; and, particularly, the brief of plaintiffs' attorneys in *Key v. Vattier*, 1 O. 132, 135-142. The latter appeals to me as being sound and more in keeping with the progress of society in general and of the administration of justice in particular, and with the development of commerce which has ensued since the days in which the rule had its origin. There is nothing inherently wrong or immoral in such contracts. They are not mala in se. The feudal system no longer exists. There is no class of powerful lords on the one hand and of ignorant poor on the other in danger of being crushed. The administration of justice is in safe hands and any abuse

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of judicial power is now the rare exception. If a suit is groundless the court will easily ascertain that fact and fearlessly declare it. Attorneys have long been regarded as entitled to a reasonable compensation for their services and to the right to sue for the same and, subject, perhaps, to certain limitations, to contract generally with their clients. Purely contingent fees are now regarded in many jurisdictions as legitimate. *Perry v. Dicken*, 105 Pa. St. 83, 89; *Jewell v. Neidy*, 61 Ia. 299, 300; *Dockery v. McLellan*, 67 N. W. (Wis.) 733, 735. The supreme court of the United States so regards them, at least in proceedings against the United States government or before some of its departments. *Taylor v. Bemiss*, 110 U. S. 42, 45. Choses in action are now assignable by statute in many jurisdictions and so, also, in Hawaii. R. L. Sec. 1739. The view has, of course, been long since exploded that a stranger may not legitimately aid a litigant by furnishing him with evidence or by appearing as a witness without a subpoena. Reputable members of the bar everywhere enter into contracts for compensation contingent upon the success or the failure of their clients and do so without reproach from themselves or from others. It is, indeed, unfortunately true that some attorneys there are in every community who abuse their privileges and would abuse this privilege to make such contracts and who, making them, would bring groundless suits and stir up baseless litigation, but, on the other hand, it is also true that there are many persons financially poor, and I think that this constitutes by far the larger class, who have worthy causes of action, and who would wholly fail to obtain redress for their grievances if they were not at liberty to enter into contracts such as this with attorneys. Whether the motive of the attorney in entering into the contracts be purely the prospect of personal gain or be purely a desire to aid the weak or is both is immaterial. When we consider whether or not public policy requires the invalidating of all such con-

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tracts we must weigh the advantages and disadvantages of freedom of action, and I think that in this instance the advantages far outweigh the disadvantages.

Among the reforms in England and in this country occurring since the date of the acts relating to champerty and maintenance "may be mentioned the enactment of the statutes for the limitation of actions, the statute of frauds, the extension of the action for malicious prosecution and that for awarding costs against unsuccessful parties. These changes have contributed materially to the discouragement of groundless and vexatious litigation." *Reece v. Kyle*, 49 O. St. 475, 483.

If it is lawful for an attorney to conduct litigation upon a contract for purely contingent fees without agreeing to advance the cost of the litigation, if, in other words, liberty to make such an agreement does not tend to unduly encourage litigation, how much more true, it seems to me, that litigation is not encouraged where the attorney in addition undertakes to bear all the costs and expenses of the proceedings. In the latter instance he is running the risk of losing not only his own services but also his cash outlays, and this necessarily adds responsibility and tends to make him more cautious before advising his client to enter suit or to continue the proceedings. Even unscrupulous attorneys would ordinarily be moved by this consideration not to enter into the prosecution of a groundless claim or defense.

Again, this is an agricultural community. A large number of our population is composed of laborers, poor in this world's goods, who at times receive bodily injuries in the course of their employment caused by the negligence of their employers. With them the denial of the right to enter into such contracts will often mean a denial of a remedy for their just grievances. Our courts are so administered that, I believe, unscrupulous lawyers will find but little encouragement for the prosecution of groundless claims, and defendants, more often

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the wealthier parties to actions, will not feel constrained to enter into unjust compromises. They may well feel confident that upon allowing the adverse claim to be presented to our judicial tribunals the latter will, if the claim be not meritorious, readily say so and award judgment in favor of such defendants. On the other hand, if the claim be meritorious, by all means let it be presented to the courts even though a part of the proceeds will finally go to the attorney and not to the client. Commercial transactions in this age are becoming more numerous and more highly favored. The right to contract with reference to every species of property has undergone large development since early days and is now better understood and more highly valued.

The right to make contracts of this particular kind should not be abridged or denied on any ground of public policy unless there is an evil clearly calling for a remedy. In my opinion there is no such evil, and therefore no justification for the declaration that such contracts are void as being contrary to public policy.

Let us return now to the second question above mentioned as to whether or not the common law rule is in force in this jurisdiction. Sec. 1 of the Revised Laws declares in part that "the common law of England as ascertained by English and American decisions is hereby declared to be the common law of Hawaii in all cases except as otherwise provided by the constitution or the laws of the United States or by the laws of the Territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage." I think that the present case falls within some of these exceptions. In part this is a case "otherwise expressly provided * * * by the laws of the Territory of Hawaii." By Statute, choses in action, including rights of action, are now assignable. Part of the cause and theory sustaining the old common law rule is thus wiped out. Our statute is inconsistent with the old rule. Neither cham-

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perty nor maintenance is a criminal offense in this Territory as it was at common law. *Mossman v. Hawaiian Government*, 10 Haw. 421, 426. In part it is "otherwise * * * fixed by Hawaiian judicial precedent." In the *Mossman* case just cited it was held that that part of the common law of maintenance which rendered a conveyance by a disseisee to a third party void as to the disseisor is not in force in Hawaii. In *Henrique v. Paris*, 10 Haw. 408, 413, 414, it was held that another part of the common law on the subject, to wit, the prohibition against a grantee entering for breach of condition of a lease outstanding from the grantor at the time of the purchase is likewise not law here. In the latter case the court said, inter alia: "The old rule is a provision of the feudal law and grew out of a state of society which does not exist in these Islands. There is not now and here the necessity that there was in England in the Middle Ages for laws against champerty and maintenance to prevent the stirring up of suits for purposes of oppression. * * * The reasons for this rule having ceased the rule itself should also cease." While the court said this, it is true that it also said, "And there can be little doubt that lessors' grantees have hitherto in these Islands acted accordingly and exercised the right of entry for breach of condition, although we do not know of any judicial proceeding directly upon the subject. * * * We are of the opinion that the old common law rule in question is not law here because it is 'otherwise established by Hawaiian national usage.'" In *Rooke v. Queen's Hospital*, 12 Haw. 375, 380, this court said, of Sec. 1, R. L., "And since the enactment of that statute the previous rejection of certain material parts of a system has been regarded as amounting to a rejection of other parts." See, also, *Wildey v. Crane*, 63 Mich. 720, 724.

Perhaps the entering into contracts to bear the expenses of litigation has not been common amongst attorneys in this jurisdiction and yet there have been such contracts. Reputable

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members of the bar have undertaken litigation upon those terms without the disapproval as far as I know of the remainder of the bar. As far as there has been any Hawaiian usage on the subject it has been one permitting the practice.

To summarize, then, on this particular subject, in at least two respects the ancient common law rule has been declared by Hawaiian judicial precedent not to be the law here. Some of the judicial utterances on the subject have been broader and would seem to justify the inference that the court in those cases regarded all of the common law on the subject to be inapplicable to Hawaii and not in existence here. In any event that which remains of the rule ought not to be considered as now in force in this jurisdiction. One at least of the rules which gave rise to the provision has been expressly negated by local statute. Usage, as far as there is one, is against it, and as we have seen in the discussion above the reasons for the rule do not exist in these Islands. For all of these reasons I am of the opinion that the common law on the subject is not in force in Hawaii and that the contract in question is not void.

The chief justice requests me to say that he fully concurs in the foregoing statement on the subject of champerty and maintenance.

The verdict of the jury read in connection with the evidence shows unmistakably that the jury awarded the plaintiff in addition to other items the sum of \$250 as a fee paid to E. C. Peters and \$50 as a fee paid to C. R. Hemenway, both of the bar, for professional services rendered. Evidence was given tending to show that the plaintiff paid these amounts to the two attorneys respectively, that to Peters being for preparing a brief in the Maile case on the appeal to the supreme court of the United States, and that to Hemenway being for obtaining from the records and officials in Washington certain information desired by Peters and cabling the same to him. The

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evidence is at best very meager as to the character and extent of the services rendered by each of the attorneys, but it may be assumed for the purposes of this opinion that it was sufficient to support a finding in a general way of what the services consisted of. There was absolutely no testimony, however, by either of the attorneys mentioned and no other evidence on the subject as to whether or not the amounts charged and paid were reasonable compensation for the services rendered. Neither of the attorneys made any statement on the subject, no experts were called to give their opinions and no attempt was made to show that the amounts paid were a customary charge for such services. From the mere fact of the rendition of the services or the making of the charges by the attorneys no inference can be drawn that the charges were reasonable. This is not a reflection upon the attorneys making the charges. What is a reasonable fee in a given case is often a matter of difficulty for an attorney, however conscientious, to determine either for himself or for another. It might with some force be contended that a trial judge sitting alone or a court of judges could make a finding as to the reasonable value of professional services by an attorney without express evidence of such value; but in that event it could at least be said that the judge or judges had by reason of their prior experience at the bar in the same community qualified themselves as experts to form and express opinions on the subject. With a jury, however, not even that much can be said in favor of such a rule. The jurors are men of various occupations in life other than the practice of the law. Only in rare instances at best will a juror be found who has any practical knowledge as to the value of an attorney's services or as to the varying degrees of complication and difficulty presented in different cases and proceedings. What did the jurors in this case know of the nature of the questions of law to be studied and briefed by counsel? What did they know as to whether the authorities were uniform or in

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conflict upon any one or more of the issues? What did they know of the time or care or thought required to analyze the case, and to ascertain the reasoning and the law applicable? Without the evidence of those who are competent to give testimony in such cases it would be unsafe and impracticable to ask of such jurors a statement of what an attorney's services are worth in any given case. The following authorities, while not precisely in point, are worthy of examination: *Weeks, Attorneys*, p. 696; *Vilas v. Downer*, 21 Vt. 418, 423; *Ward v. Kohn*, 58 Fed. 462, 463, 464; *Stow v. Hamlin*, 11 How. Pr. (N. Y.) 452, 453, 454; *Stanton v. Embrey*, 93 U. S. 548; *Railway v. Wallace*, 136 Ill. 87, 92; *Knight v. Russ*, 77 Cal. 410, 413; *Clark v. Ellsworth*, 104 Ia. 442, 451.

In my opinion the evidence on this subject of fees was insufficient to support a verdict for the plaintiff. He did not sustain the burden which the law places upon him to prove the reasonableness of the fees paid.

CONCURRING OPINION OF DE BOLT, J.

With regard to the validity of the agreement and the attorneys' fees, I adopt the reasoning of Mr. Justice Perry. In all other respects I concur in the opinion of the chief justice.

MOSES MILLER v. WILLIAM CHARMAN.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 2, 1910.

DECIDED MAY 6, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

Evidence—supports findings.

There was evidence in this case to sustain the findings of the trial court.

Miller v. Charman, 20 Haw. 165.

OPINION OF THE COURT BY PERRY, J.

This is an action to quiet title. George Charman died leaving a will executed June 27, 1887, by which he devised inter alia to his wife Mary Charman for life, remainder in fee to his grandson Moses Miller, "the store and land now leased to L. Turner," and to his son, William Charman, for life, remainder in fee to his grandson Moses Miller "my house and lot in Koloa now occupied by him" (William Charman) "as a dwelling house." The plaintiff is the remainderman named in these clauses and the defendant the life tenant in the second clause. The controversy between the parties is as to the boundary between the two pieces of land.

June 11, 1885, George Charman executed a lease to one Apau for the term of fifteen years, rent free for the first five years, in which instrument the only language used by way of description of the demised property is as follows: "That the said party of the first part for and in consideration of a certain piece of land in the corner of William Charman's land where his store now stand from the wall to the post and railin fence in wide forty feed herein after mentioned, has granted, Leased and demised to the party of the second part." Nothing was "hereinafter mentioned" which can throw light upon the location or the extent of the demised property. Apau subsequently became bankrupt and his assignees in bankruptcy assigned the lease to one L. Turner, George Charman's written consent to the assignment being dated May 28, 1886. March 19, 1887, George Charman by written instrument leased to L. Turner for the term of fifteen years "a piece of land situated back of his store at Koloa adjoining lot on which said store is built" and more particularly described as follows: "Commencing at stone wall on the makai side of lot it runs eighty-eight (88) ft. along said wall, measuring from back of building from thence to mauka fence a distance of seventy (70) ft. at right angles to said wall, from this point eighty

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(80) ft. along fence to back of building, and from thence seventy-nine (79) ft. to starting point.”

The parties agreed at the trial that the description in the Apau lease is ambiguous and that extrinsic evidence was admissible to show the location and the extent of the land demised and such evidence was freely admitted tending to show the location of walls, fences and other monuments on the land and vicinity and all other surrounding circumstances at the date of the leases and of the will, and also the practical construction of the parties at and shortly after that time. The circuit judge, jury having been waived, found that the description included a lot extending from the corner of the Charman land and running southerly about forty feet and easterly about eighty feet to certain points definitely disclosed in his opinion. Defendant excepted.

The only exceptions are to the decision and to the formal judgment entered in pursuance of it.

The question before the trial judge was as to how much land was included in the description of the Apau lease. The question now before this court is simply whether there was evidence sufficient to support the findings made. We are not at liberty to consider and weigh the evidence and to determine de novo whether the land now in dispute was or was not demised to Apau and held by his successor under the assigned lease at the date of the will. In view of the admitted necessity for extrinsic evidence the question became one largely of fact and the decision cannot be disturbed, for from the evidence a reasonable person could draw the inference and reach the conclusions of fact which were drawn and reached in the court below.

It was conceded at the trial that “the store and land now leased to L. Turner” included the lot known as the pasture described in the lease of March 19, 1887, to L. Turner, and also a piece lying between the pasture and the road and in the cor-

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ner of the Charman land, at least forty feet long by forty feet wide. The precise dispute was as to the remaining portion, also about 40x40 feet, adjoining the corner piece just mentioned and extending to the easterly line of the pasture.

Three possibilities of the construction of the description have been suggested: (a) That the land extended from the wall to the post and railing fence and that the distance between these two monuments was forty feet; (b) that the land was forty feet long by forty feet wide; and (c) that in length it extended from the wall to the fence and in width measured forty feet. The first of these would seem to be the least deserving of consideration for it would leave the description wholly without a statement of one of the dimensions. Between the second and third the trial court had its choice upon the evidence, and the third as a pure matter of construction was at least as plausible as the second.

While there was some evidence to the contrary from which, perhaps, the trial court could have found in favor of the defendant, there was ample evidence to support the following findings: that at the date of each of the leases and of the will a stone wall known as the "K. P. wall" ran along the westerly boundary of the Charman property from its westerly corner at the road to at least the rear end of the land covered by the lease of March 19, 1887; that along the opposite or easterly side of the lot last referred to was a post and railing fence, and from the end of that fence to a large tree near the government road and substantially in continuation of the line of the fence stood a stone wall; that the northerly end of this post and railing fence was at the line of the rear of Apau's building; that during Apau's possession under his lease he had and occupied a store and dwelling house, all in one building and additions thereto, extending from the K. P. wall eastwards to within twelve or fifteen feet of the easterly wall above mentioned and southerly to the line of the pasture later leased to L. Turner;

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that L. Turner took possession of the same property occupied by Apau including all of the buildings and also used as a roadway and as a place for storing his carriage the strip about twelve to fifteen feet wide adjoining the easterly wall; that in all respects both Apau and L. Turner and also F. Turner, who succeeded to the possession by transfer from L. Turner, dealt with the whole of the land from the K. P. wall to the easterly wall and from the pasture lot to the road as though they were entitled thereto under the Apau lease and its assignments; that George Charman, the lessor and testator, was on the premises very frequently and well knew of the extent of the occupation by Apau and L. Turner and F. Turner; that George Charman at no time disputed the possession or title of any one of these three tenants, and that William Charman was not at the date of the will in occupation of any part of the land west of the easterly wall.

The circuit judge seems to have been greatly influenced in arriving at his conclusion by the fact that under the lease to L. Turner the pasture lot was made to extend from the K. P. wall to the easterly wall and the fence in continuation thereof, and by the fact that the third course of its description extended "to back of building," from which he inferred a rightful occupation at that time by L. Turner as far as the easterly wall and fence. Any reasonable person might well have been influenced by this consideration, and yet the circuit judge did not base his decision wholly upon it. He also relied, as his written opinion shows, upon other evidence in the case and may well have found that the post and railing fence on the easterly side of the pasture lot was the "post and railin fence" mentioned in the Apau lease, that the K. P. wall was the wall there referred to and that the width of forty feet was intended to denote the depth of the lot from its frontage on or near the street.

Under the circumstances the findings and judgment cannot be set aside.

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The exceptions are overruled.

L. J. Warren (Smith, Warren & Hemenway on the brief)
for plaintiff.

J. Lightfoot for defendant.

MANUEL GARCIA, BY HIS NEXT FRIEND ANTONIO
GARCIA, v. KEKAHA SUGAR COMPANY, LIM-
ITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 2, 1910.

DECIDED MAY 6, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

Limitation of actions—injuries to person.

Act 113 S. L. 1907, limiting to one year the time for bringing actions for injuries to the person, does not allow exceptions for disability of infancy such as were made in Sec. 1979 R. L.

OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff, a minor, brought by his next friend this action to recover the sum of \$15,000 for personal injuries resulting from negligence in stopping without warning and at an unusual place a train of open flat cars, on one of which the minor was riding, and from defective appliances, guards and couplings. The defendant's demurrer to the declaration on the ground that "it appears that the cause of action attempted to be set forth is barred by limitation of the time by reason of and under the provisions of Act 113 of the Session Laws of 1907," was sustained, and the plaintiff electing to stand by his declaration judgment was entered for the defendant the plaintiff excepting thereto as well as to the order sustaining the demurrer.

The claim of the plaintiff is that Act 113 which limits the

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bringing of such actions to one year after the cause accrued is subject to the provision (Sec. 1979 R. L.) of the general statute of limitations (Sec. 1971 R. L.) by which if a person receiving personal injuries is within the age of twenty years the time of six years therein limited for bringing his action does not begin to run until he reaches his majority.

The argument in substance is that the statute which makes this provision for disability is not expressly repealed by Act 113 and is not repealed by implication since, as the plaintiff claims, there is nothing in the provision for disability which is necessarily inconsistent with Act 113. A large number of cases are cited to the effect that repeals by implication are not favored, which is true, in the meaning that the implication ought to be quite clear, but our statute, with this modification, fixes the rule on this subject.

"The repeal of a law is either express or implied; it is express when it is literally declared by a subsequent law; it is implied when the new law contains provisions contrary to, or irreconcilable with, those of the former law." Sec. 21 R. L.

Act 113 S. L. 1907 enacts: "Actions for the recovery of compensation for damage or injury to persons or property must be instituted within one year next after the cause of action accrued, and not after. Provided that actions, on such causes, which accrued prior to the approval of this Act, if otherwise barred hereby, may be brought within one year after such approval and not later."

This last enactment on the subject does not purport to amend Sec. 1971 R. L. and is inclusive of all cases therein mentioned.

The argument of hardship to the minor in not being allowed until he becomes of age to bring his action presents a question of legislative policy which we are not at liberty to consider.

Exceptions overruled.

T. M. Harrison for plaintiff.

C. R. Hemenway (Smith, Warren & Hemenway on the brief) for defendant.

Hau v. Palolo Land & Improvement Co., 20 Haw. 172.

LOIKA HAU v. PALOLO LAND AND IMPROVEMENT
COMPANY, LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 11, 1910.

DECIDED MAY 16, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

WATERS AND WATER COURSES—*dams, duty of owner.*

The owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will be capable of resisting the water of a stream in times of ordinary, usual, and expected freshets, and if he does not do so he will be liable for any injuries resulting from his neglect.

EVIDENCE—*supports findings.*

There was evidence in this case to sustain the findings of the trial court.

OPINION OF THE COURT BY DE BOLT, J.

This is an action of trespass on the case, brought by the plaintiff to recover the sum of \$1000 for damages to her land and destruction of her crops and trees, caused, as she claims, by the breaking of a certain dam constructed and owned by the defendant. The land is situated on the Waio Mao in Palolo valley, and at the time the damage complained of occurred, March 12, 1909, the plaintiff had then been residing thereon about five years. The land was improved and in a good state of cultivation. There was growing thereon a large quantity of taro, fruit trees, bananas, sugar cane and vegetables. The dam in question was constructed some three or four years prior to March 12, 1909. It was constructed in an opening in the rim of the crater of a small extinct volcano at the head of the Waio Mao stream, the purpose being to use the crater as a reservoir in which to accumulate and impound a large quantity of water for irrigation and other purposes.

The case was tried, jury waived, and the court found for the

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plaintiff in the sum of \$703.25 and costs. The defendant saved a number of exceptions, but all were abandoned at the oral argument in this court, except one, namely, that the judgment of the circuit court was contrary to the law and the evidence; but upon an examination of the record before us we have no hesitancy in holding that the judgment was abundantly supported by the evidence and that it is free from legal objection.

Counsel for defendant in his oral argument, as well as in his brief, argued at length upon the evidence and the inferences to be drawn therefrom. These are questions exclusively within the province of the trial court. The decision of a circuit court, jury waived, is equivalent to a verdict of a jury, and will not be disturbed if supported by evidence. It is settled beyond question in this jurisdiction, that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury.

Now, with regard to the cause of damage to plaintiff's property: While there was, perhaps, some evidence to the contrary, there was, however, ample evidence to support the plaintiff's contention that the dam in question was not properly nor scientifically constructed; that it was not sufficiently strong for the purposes intended; and that in consequence of its negligent, defective and improper construction and insufficiency, and not as the result of an unusual freshet over which the defendant had no control, as is contended by counsel, the dam, at about 2 p. m. on the date mentioned, suddenly broke, permitting an immense volume of water to rush down the Waiomao stream, described by some of the witnesses as a great wave or billow twenty or twenty-five feet high. The force and volume of the water was such that it carried with it trees, fences, boulders, rocks, stone and gravel, and when it reached the premises of the plaintiff the result was that practically everything on the land was destroyed, and the land itself was rendered valueless for cultivation, being covered, as it was, with a deposit of from ten

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to twenty inches, consisting of sand, gravel, pebbles, rocks and boulders.

Without specifically referring to all the evidence upon this phase of the case, suffice it to say, that it was sufficient to invoke the application of the following rule of law, the requirements of which the defendant is shown to have failed to observe in the construction and maintenance of its dam, namely: "The owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will be capable of resisting the water of a stream in times of ordinary, usual, and expected freshets, and if he does not do so he will be liable for any injuries resulting from his neglect." 8 Am. & Eng. Ency. Law 717; *Gray v. Harris*, 107 Mass. 492; *N. Y. v. Bailey*, 2 Denio (N. Y.) 433; Angell on Water Courses, Sec. 336.

It is also urged that the damages awarded are excessive. We cannot concur in this view. Not only is there abundant evidence to support the finding of the circuit court in this regard, but there is also evidence tending to show that the value of the taro and trees destroyed was \$300, and that it would cost \$500 to remove the debris from the land and \$100 to reopen the irrigation ditches, a total of \$900, thus exceeding the amount awarded by \$196.75. There being no error in the record and the evidence being sufficient to support the judgment of the lower court, the exceptions are overruled.

M. F. Prosser, (*Kinney, Ballou, Prosser & Anderson* on the brief) for plaintiff.

W. A. Greenwell (*Castle & Withington* on the brief) for defendant.

Lord v. City and County of Honolulu, 20 Haw. 175.

E. J. LORD *v.* THE CITY AND COUNTY OF HONOLULU; J. A. GILMAN, AND JAMES BICKNELL, AUDITOR OF THE CITY AND COUNTY OF HONOLULU.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 17, 1910.

DECIDED MAY 21, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

MUNICIPAL CORPORATIONS—*contract for patented pavement—competitive bids.*

The statute, Sec. 1, Act 62 S. L. 1909, does not require competitive bids for a contract by the City and County of Honolulu for a patented street pavement as the same does not admit of competition.

OPINION OF THE COURT BY HARTWELL, C.J.

With the exception below mentioned the case is correctly stated by the plaintiff as follows: "This is a bill for injunction brought by a taxpayer to restrain the City and County of Honolulu from entering into a contract with J. A. Gilman for the paving of a portion of Fort Street, Honolulu, and to restrain the auditor of the city and county from making payments under said contract. The complaint is based on the facts that this contract involves the expenditure of over \$500, to-wit about \$16,000, of public money for a public work, and that it was awarded without public advertisement for tenders, and was not awarded to the lowest bidder, as required by law. The case was heard upon the bill of complaint and upon the return of respondents to an order to show cause why an injunction should not issue; and from the decree of the third judge of the first circuit court thereupon made dismissing the bill, this appeal is taken. By stipulation also, the return is adopted as the answer of the respondents, so that the decree is final. The

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answer of the respondents' return is: (1) That the complainant is without sufficient interest in the subject matter to entitle him to relief; (2) that the pavement mentioned in the bill of complaint is the product of a patented process which is in a class by itself, and that the respondent, Gilman, is the only person in Hawaii authorized to enter into contracts for installing and constructing such pavement in the Territory of Hawaii; from which the respondents conclude: That the execution of a contract for such 'Bitulithic' pavement would be for a purpose not admitting of competition." The plaintiff, however, admitted in his brief in reply and in argument that the answer was that Gilman was the only person authorized to enter into a contract for constructing the pavement in Hawaii.

The injunction was denied upon hearing the order to show cause.

Sec. 1, Act. 62 S. L. 1909, enacts: "No expenditure of public money, except for salaries or pay of officers or employees, or for permanent settlements, subsidies or other claims or objects for which a fixed sum or sums must be paid by law, or for other purposes which do not admit of competition, where the sum to be expended shall be Five Hundred Dollars (\$500.00) or more, shall be made, except under contract let after public advertisement for sealed tenders, in the manner provided by law; and no expenditure for public purposes shall be so divided or parcelled as to defeat or evade the provisions of this section. Provided, however, that any county, or city and county may, if its Board of Supervisors shall so decide, expend sums in excess of Five Hundred Dollars (\$500.00) upon road work or repairs without contracting therefor."

The defendants' contention is (1) the plaintiff has no right merely as a taxpayer to the injunction prayed for; (2) the pavement contracted for is a patented process not admitting of competition, and (3) expenditure in excess of \$500 is authorized upon road work or repairs "without contracting therefor" in the way required by statute, namely, upon competing bids.

The question whether a taxpayer's right to an injunction is confined to cases of unauthorized use of public money in which

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he has a direct pecuniary interest and does not include cases of authorized use in a way inhibited by statute in which he has no pecuniary interest does not require consideration in view of the conclusion reached by us upon the second point.

We will consider whether the proposed expenditure for the patented pavement, not being for claims or objects "for which a fixed sum or sums must be paid by law," is "for other purposes which do not admit of competition."

What are purposes of expenditure which "do not admit of competition?" It is clear that the selection of the kind of pavement best adapted to the public streets of Honolulu, if new pavement is required, or deciding whether paving is likely to be better than the macadamizing to which the public is accustomed presents no judicial question.

The plaintiff submits that selecting a patented pavement obtainable from only one source is against the policy of the statute which is intended to prevent graft or favoritism and that in order to accomplish this object the requirement of competitive bids implies prohibition of such selections; and that the least that ought to be required is that a patented pavement obtainable from only one source ought not to be contracted for unless it is shown that other equally good pavement is not obtainable by advertising for competing offers. The plaintiff's contention that until bids are called for no one can say that agents elsewhere would not offer the patented pavement at a lower price than is asked by the local agent Gilman was expressly withdrawn in his brief in reply and in argument.

There is a limit beyond which arbitrary exercise of power cannot be avoided, and this is recognized by the exception in the statute from competition in respect of claims or objects "for which a fixed sum or sums must be paid by law." The expenditures "for other purposes which do not admit of competition" not being for sums of money fixed by law or ascertainable by means of competitive bids must be determined by the

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reasonable exercise of discretion on the part of the board of supervisors, for how otherwise can they be determined? We are not authorized to declare that there can be no expenditures for street paving or that no patented pavement can be purchased unless its owner has agents ready to underbid each other in selling it. To declare such a doctrine of law on the ground that it is public policy to prevent discretionary expenditures would obviously be to ignore the statute which contemplates such expenditures and would be an unwarranted assumption of judicial power. For the necessity or propriety of expenditures which do not admit of competition there can be no rule of law other than that of common honesty and intelligence. To submit the municipality to unnecessary or exorbitant expenses for street paving or for any other purpose points to the dreary graft and corruption abuses of which municipal government appears to be so often susceptible, and we are glad to observe that the plaintiff's attorneys say that they "do not claim nor infer there to be the slightest suspicion in this instance" of graft or favoritism. When a case of fraud is presented there will be no difficulty in obtaining an injunction from a court of equity, but this is not such a case.

Referring again to the meaning of the statute, it is a "purpose" not admitting of competition if, as in this case, the desired material is obtainable from no other person than the patentee's agent who alone can apply it to the required use. But the impossibility of obtaining this pavement from any one else than from Gilman, the sole agent for its sale in this Territory, is evident and to advertise for competing bids from other agents, whether within or without the Territory, would not only be useless but absurd.

Consideration then of the statute and of the facts in the case leads to the conclusion that the proposed expenditure under the paving contract is for a purpose which does not "admit of competition."

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Against the plaintiff's citations of decisions upon construction of statutes to render them effective for their intended object and that a statutory requirement of competing bids impliedly prohibits the use of a patented pavement the defendants cite cases to the effect that courts have no power to enjoin the use by a municipality of patented street pavements although obtainable only from the patentee or his agent.

In the cases cited upon the right of a municipal corporation under statutes requiring competitive bids to use a patented pavement securing to the patentee a monopoly the courts reach directly opposite conclusions upon the principle involved but have no occasion to consider the effect of a statutory provision like our own which excepts expenditures for purposes which do not admit of competition.

The following cases illustrate the opposing views of general statutes upon the subject: Contract valid without advertisement: *Hobart v. Detroit*, 17 Mich. 245; *In re Dugro*, 50 N. Y. 513; *Silsby Mfg. Co. v. Allentown*, 153 Pa. St. 319; *Baltimore v. Flack*, 64 Atl. (Md.) 702; *Holbrook v. Toledo, Circuit Court of Lucas County, Ohio*, 1906; *Saunders v. Iowa*, 134 Ia. 132; *Swift v. St. Louis*, 180 Mo. 80; *Field v. Barber Asphalt Paving Co.*, 117 Fed. 925. Contract invalid without advertisement: *Dean v. Charlton*, 23 Wis. 590; *Fishburn v. Chicago*, 171 Ill. 338; *Monaghan v. Indianapolis*, 76 N. E. (Ind.) 424; *Fineran v. Central Bitulithic Paving Co.*, 116 Ky. 495; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; 1 Dillon, Mun. Corp., 3 Ed., §467.

The conclusion that competing bids are not required renders it unnecessary to consider the defendants' third point.

Decree affirmed.

C. F. Clemons and C. C. Bitting (Thompson, Clemons & Wilder on the brief) for plaintiff.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney, with him on the brief), for defendants.

Emmeluth v. Au In Kwai, 20 Haw. 180.

EMMELUTH & COMPANY, LIMITED, *v.* AU IN KWAI,
C. AH YETT, LUKE JICK TING, YIM KWOCK
HUNG, HOY KEE, AND LAU WING HON, DOING
BUSINESS AS "LUEN CHONG COMPANY," AND
J. WEBER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 4, 15, 1910.

DECIDED JUNE 20, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

MECHANICS' LIENS—*not maintainable upon structure alone.*

Under Section 2173, R. L., a lien cannot exist or be enforced against any of the structures there named separately from the interest of its owner in the land upon which it is situated.

Id.—*notice of lien.*

The instrument set forth in the opinion held not to be a notice of the existence or claim of a lien upon the owner's interest in the land.

OPINION OF THE COURT BY PERRY, J.

This is an action brought under R. L. Sec. 2177, the plaintiff claiming of the defendant J. Weber, who is alleged to have been "the original contractor," the sum of \$635.50 for work and labor done and materials furnished, and praying for the enforcement of a lien upon a certain revolving bake oven and upon the interest of the remaining defendants in the land upon which the oven stands. Judgment was rendered for the enforcement of the lien as prayed for.

The notice of lien filed under R. L. Sec. 2174, reads as follows:

"Notice is hereby given that Emmeluth & Company, Limited, an Hawaiian Corporation, having its principal office in Honolulu, Territory of Hawaii, claims a lien under Section 2174 of the Revised Laws of Hawaii as amended by Act 97 of the Session Laws of 1909, against Au In Kwai, C. Ah Yett, Luke Jick Ting, Yim Kwock Hung, Hoy Kee, and Lau Wing Hon, all of said Honolulu, doing business under the firm name and

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style of 'Luen Chong Company,' and carrying on the business of bakers and manufacturers in said Honolulu, for labor and material furnished in the construction of that certain revolving bake oven situated on the premises of said Luen Chong Company and within the building used as the Luen Chong Company Bakery, 120 North King Street, between Maunakea and Kakaulike Streets, in said Honolulu.

"Said lien is for the sum of \$635.50, and interest thereon from September 24, 1909, the same being for labor and material furnished by said Emmeluth & Company in the construction of said revolving bake oven, the nature of said labor and material, and the price and cost thereof, being more fully set forth in the schedule hereto attached and marked 'Exhibit A.,' and made a part hereof.

"That said members of said 'Luen Chong Company' are the owners of the said above described property and that said claim for \$635.50, together with interest thereon as aforesaid, does not exceed the value of said property.

"That the said sum of \$635.50 claimed is just, is due, and wholly unpaid.

"That this notice and claim for lien is filed within 45 days and no longer after the completion of the construction of said revolving bake oven against which it is filed; and

"That said Emmeluth & Company, Limited, will enforce in said sum of \$635.50, with interest and costs, by instituting suit therefor in the courts of the Territory of Hawaii, as authorized by law, unless said lien shall be sooner satisfied by the payments of said claim and costs of this proceeding."

Is this a sufficient notice within the meaning of Sec. 2174 of the existence of a claim of a lien upon the interest of the owners of the oven in the land upon which it stands? The natural reading of the instrument leads to the conclusion that it is not. The attention throughout seems to be drawn to the fact that the lien is claimed upon the oven. There is no specific statement that any lien exists or is claimed against the interest of its owners in the land, nor even that its owners have an interest in the land. The phrase does indeed occur, "on the premises of said Luen Chong Company," but this was inserted merely

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by way of description of the oven. The notice was evidently drawn upon the theory that the claim was against the oven only, and, while the declaration sets forth a claim against both the oven and the interest of its owners in the land, the claim throughout the trial below and at the argument on these exceptions was expressly confined to that of a lien upon the oven alone, the contention in both courts being that a lien upon the structure, separately from any interest in the land, is authorized by our statute. Sec. 2174 expressly requires, among other things, that the notice contain "a description of the property sufficient to identify the same." This doubtless means the property upon which the lien is claimed. The notice, as filed, does not comply with this requirement, the language used being merely descriptive of the oven. It would only be by surmise or by an unduly strained construction that a suggestion could be found in the document of a claim of lien against the interest of the defendants in the land. Under Sec. 2174 the notice required is a notice "thereof," that is, of the lien, and even though by a strained construction it could be held that the fact that the defendants own an interest in the land is sufficiently disclosed, still no language is used to permit the construction that a lien exists or is claimed upon that interest. The statute requires that all matters should be set out which are "necessary to a clear understanding" of the claim. As far as the interest in the land is concerned that provision likewise is not complied with in the attempted notice. The view that in the notice the claim was intended to be confined to a lien against the oven is strengthened by the language of the paragraph before the last referring to the "revolving bake oven against which it" (the claim of lien) "is filed."

Sec. 2174 specifically provides that the lien does not attach unless notice thereof is filed within the time stated. As to the defendants' interest in the land, no notice having been filed, the lien did not attach and cannot now be enforced. This

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leads to a consideration of the question whether a lien can exist under this statute against the structure independently of its owner's interest in the land. The oven, in the construction of which the labor and materials were used, is 14 feet in length by 13 feet in width with walls of brick placed upon foundations of concrete extending from 6 to 7 feet below the surface of the ground. No evidence whatever was adduced at the trial tending to show what interest, if any, the defendants other than Weber had in the land upon which the oven stands, or by what right they caused, if they did, the oven to be there constructed. Counsel on both sides agreed, however, both at the trial and in this court and presumably with reference to the facts as well as to the law, that the oven was a trade fixture, at least as between the landlord and the defendants, removable by the defendants at any time before the expiration of their tenancy. They are also agreed that the oven is a "structure" within the meaning of Sec. 2173.

In the attempt to support the judgment the plaintiff's main reliance is upon the contention that a lien exists against the oven separately. In this view we cannot concur. The question is purely one of statutory construction. Sec. 2173 reads as follows: "Allowed when. Any person or association of persons furnishing labor or material to be used in the construction or repair of any building, structure, railroad or other undertaking, shall have a lien for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated." The lien given is upon the structure as such and not upon its materials. It was apparently intended by the legislature that the lienor, as well as the purchaser at the execution sale, should have the benefit of the use of the structure as such and for that reason as well as for other

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reasons, provided that the interest of the owner in the land should also be subject to the lien. In the case at bar a sale under foreclosure of a lien against the oven would be in its practical results a sale of the materials only. In the great majority of cases buildings are erected only by those who have an interest in the land upon which they stand. That interest may be the fee or it may be something less; it may be for a longer or for a shorter period, and it may in some cases, perhaps, permit or require the removal of the building at the expiration of the term. But whatever the interest, if it is seized jointly with the building, the value of the latter to the lienor and to the purchaser will, it is obvious, be ordinarily much greater than if the interest in the land were not also liable for the debt. More important still is the fact that to construe the statute as contended by the plaintiff would be to permit the lienor at his option to sacrifice in many, perhaps in most, instances much of the value of the debtor's property. A building, if subject to be sold separately, could be forced upon the market for the value of its materials only with the consequent loss to the owner of the greater part of its cost and value as a completed structure. Again, difficulties would often accompany an attempt to sell separately the structures not removable by the persons erecting them. What rights of ingress or egress would the purchaser have in removing the materials? If the owner of the land should see fit to erect a fence around the structure what remedy would the purchaser have? How much time after the sale would the purchaser have for the removal? The statute is silent on all these points and does not provide any method by which a lien established upon a building alone can be made of value to a lienor. It is true that this particular structure is agreed to be a trade fixture but the statute makes no distinction between trade fixtures and other structures. If the oven is subject to a lien it is not because it is a trade fixture but because it is a structure, and if all structures

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are subject to a lien then the above mentioned reasoning relating to the policy of the law and to difficulties of enforcement applies. Nowhere in the statute do we find any provision indicating that the legislature intended to allow a lien on a structure separately from its owner's interest in the land. A lien against this oven only is not within the contemplation of the law.

But little aid can be derived from decisions in other jurisdictions. Each is necessarily based upon the language of the statute under consideration, and the provisions of each of the statutes differs to a greater or lesser extent from those of our statute. In *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 432, the court found in the history of its statutes, and particularly in certain amendments incorporated in the law then before it, indications that the legislature intended that liens should be enforceable against structures apart from any interest of their owners in the land. No such history or amendments exist in the case at bar. It may be added at this point that earlier Massachusetts cases contain reasoning to the contrary. See *Belding v. Cushing*, 1 Gray 576; *Hayes v. Fessenden*, 106 Mass. 228, and *Stevens v. Lincoln*, 114 Mass. 476. In *Turner v. Robbins*, 78 Ala. 592, there was a mortgage on the land executed prior to the erection of the improvements, and a provision in the statute that "any person enforcing such lien, where there is a prior mortgage or lien upon the land, may have such building, erection or improvement sold under execution, as provided in this chapter, and the purchaser may remove the same within a reasonable time thereafter." Largely by reason of this provision the court seems to have reached the conclusion that even in cases where there was no prior mortgage the creditor could waive the lien as to the land and enforce it solely against the improvements. To the extent, at least, of the provision just quoted the Alabama statute differs from ours. In *Babbitt v. Condon*, 27 N. J. L. 154, *Coddington v. Dry Dock*

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Co., 31 N. J. L. 477, and *Ranson v. Sheehan*, 78 Mo. 668, the court construed the statutes as we construe ours. Notwithstanding possible differences in the language of the statutes, the reasoning of those opinions is instructive and to some extent applicable. See also Phillips on Mechanics' Liens, Sec. 199, and *Kellogg v. Mfg. Co.*, 1 Wash. 407.

The questions here considered are sufficiently presented under exceptions 4 and 5 and perhaps under others. Exception 4 was to the overruling by the court of the defendants' objection to the introduction of any testimony, and exception 5 to the overruling of defendants' objection to the introduction in evidence of the notice of lien, the ground of the objection in each instance being "that the property described in the complaint and the notice of lien is not such property as is subject to lien in contemplation of Section 2173, Revised Laws of Hawaii."

The other questions argued need not be determined as in no event can a judgment enforcing the lien be supported.

The exceptions are sustained, the judgment set aside and the case remanded with directions to enter judgment, as far as the lien is concerned, for defendants, and for further proceedings not inconsistent with this opinion. Whether by inadvertence or otherwise no personal judgment was entered, although ordered, against Weber.

M. F. Prosser and A. G. Smith (*Kinney, Ballou, Prosser & Anderson* on the brief) for plaintiff.

C. C. Bitting (*Thompson, Clemons & Wilder* on the brief) for defendants.

MAY T. HERBERT *v.* WILLIAM HENRY, A. MARQUES,
HENRY BICKNELL, C. F. PETERSON AND F.
ANDRADE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 23, 1910.

DECIDED JULY 1, 1910.

Herbert v. Henry, 20 Haw. 186.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

EQUITY—principal and agent—money had and received.

Where an agent receives money for his principal for certain mining stock and fails to remit the same, a bill in equity for an accounting is not proper, there being a plain, adequate and complete remedy by an action at law for money had and received.

OPINION OF THE COURT BY DE BOLT, J.

This is an interlocutory appeal by defendants from an order overruling their demurrers to plaintiff's bill.

The facts, as alleged in the bill, are, in substance, as follows: That plaintiff is a resident of Sydney, Australia; that defendants all reside in Honolulu, Territory of Hawaii; that plaintiff, together with her husband and children, resided in this Territory for a considerable time prior to August 22, 1908, when they left, intending to make their home in Sydney, where they have since resided; that plaintiff's husband, H. L. Herbert, returned alone on a business trip, arriving at Honolulu January 7, 1909, and returned to Australia on the steamship sailing from Honolulu February 7, 1909; that plaintiff, while a resident of Hawaii, acquired 40,000 shares of the capital stock of the Benton G. Mining Company, an Arizona corporation, of which defendant Henry is secretary; that prior to April 23, 1909, plaintiff entrusted the certificate for said stock to the possession of Henry as her agent; that on or about said last mentioned date, plaintiff sold said stock to one T. J. Ryan for the sum of \$2000, and thereupon instructed her agent to transfer the same to the purchaser and remit the proceeds to her; that Henry, instead of remitting the proceeds of the sale as directed, retained the same; that on June 22, 1909, the defendants Peterson and Andrade, as attorneys for defendant Marques, filed in the circuit court of the first circuit, an action against plaintiff and her husband, claiming \$640 as rent, in which action summons was issued and served at a purported

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last and usual place of abode of the plaintiff and her husband at the Beach Road near Hobron Lane in Honolulu, though at that time, as well as at all other times hereinafter mentioned, the defendants knew the last and usual place of abode of plaintiff and her husband was in Sydney; that no further proceedings were had by way of service in said case, in which defendant Henry as secretary of the said Mining Co. was summoned as garnishee; that on June 23, 1909, Marques instituted three separate actions in the district court of Honolulu, in which Peterson was his attorney, upon three certain notes signed by H. L. Herbert, in each of which Henry was summoned as garnishee, both individually and as secretary of said Mining Co., and in each of which service was purported to have been made on H. L. Herbert at 1475 Ala Moana Road, Honolulu, as his last and usual place of abode, judgment being rendered against him in each action; that plaintiff and her husband were unaware of said proceedings until June 30, 1909, when Henry cabled to plaintiff as follows: "Marques garnishes for debt; unless settled immediately balance money jeopardized; shall I pay and remit balance. Henry." To which plaintiff responded by cable on July 1, 1909. "To Henry, Honolulu. Yes. Herbert." To which Henry, on July 2, replied by cable: "To Herbert. Answer unsatisfactory. Please both answer." To which plaintiff and her husband replied by cable July 4, as follows: "To Henry, Honolulu. Yes. May and H. Herbert." That on June 30, 1909, Bicknell, by Peterson, his attorney, brought an action against H. L. Herbert in the district court of Honolulu, summoning Henry as garnishee, claiming the sum of \$96 and interest for dental services rendered to the two daughters of plaintiff; that summons was duly issued and on said date served on the garnishee; that no service was made or purported to have been made on H. L. Herbert therein other than a purported service made July 2, 1909, at Mrs. Kearns', 184 South Hotel street, in Honolulu, described as the last and

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usual place of abode of H. L. Herbert. (See ante p. 132.) That plaintiff and her husband admit that he executed the notes on which the actions were brought by defendant Marques; but deny that they were indebted to said Marques for rent, and that H. L. Herbert was not indebted to Bicknell; that having no information other than the cablegrams, and knowing of said notes and being willing to pay them, plaintiff and her husband sent the cablegrams understanding that the cablegrams sent by Henry referred to a garnishment for the claim on said notes; that the authority contained in said cablegrams was intended and only authorized Henry to settle the garnishment for the claim on said notes, but that, without any regard to the interests of plaintiff and her husband, and particularly without regard to his duty as agent for plaintiff, Henry voluntarily without any authority whatsoever paid Peterson and Andrade, as attorneys for Marques, the sum of \$849.85 in settlement of said action brought by him in the circuit court against plaintiff and her husband, which action was thereupon dismissed; that Henry particularly acted without regard to his duty as agent for plaintiff in said action brought by Bicknell; "that plaintiff has been informed and believes, and on said information and belief alleges, that all of said acts and proceedings of said defendant were in pursuance of a combination and conspiracy for the purpose of sequestering and appropriating the money of the plaintiff in the hands of the said William Henry to the use and benefit of the other defendants herein, without due process of law; and that, in pursuance of said conspiracy, the proceedings above set forth were had and the said payments made."

The prayer of the bill is, that William Henry render an account of all moneys received and paid on account of the plaintiff, and that the other defendants be adjudged to account for any and all moneys which they have unlawfully obtained from said William Henry as agent of plaintiff, and for general relief.

Each of the defendants interposed a demurrer to the bill,

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alleging various grounds, but relying particularly upon the ground that the plaintiff had a plain, adequate and complete remedy at the common law. In this view of the case, as presented by the pleadings, we concur with the defendants. The facts as set forth in the bill present simply a case of money had and received by the defendant, William Henry, for the use and benefit of the plaintiff, and a declaration in assumpsit in the usual form would have fully stated the plaintiff's cause of action. (*Gaines v. Miller*, 111 U. S. 395.)

Upon an examination of the bill it will be observed that the allegation of such facts as are ordinarily necessary, in cases of this character, to invoke the equitable powers of a court of chancery are totally absent. There is no allegation of insolvency, or that a judgment at law could not be enforced. There is no trust alleged, or that the money in the hands of the agent was a trust fund, or impressed with a trust; nor is there any sufficient allegation of fraud or collusion. The charge of conspiracy (quoted above) is a mere legal conclusion. No facts are alleged therein, nor does the bill contain any allegation of fact sufficient to warrant such a conclusion.

There is no occasion for a discovery or an accounting because plaintiff knows how much the defendant, Henry, received for the stock and what he did with it. Indeed, it would seem from the minute particularity of the allegations as set forth in the bill, that the plaintiff was fully informed regarding her money and business matters in the hands of her agent. She does not allege any fact, as a basis for an accounting, which is peculiarly within the knowledge of her agent and not within her own knowledge. The mere fact that her agent, as she contends, has been remiss in his duties as such,—for instance his failure to promptly remit the money he received for the stock, or that he may have permitted the money to be garnished in his hands, or that he may have paid claims that had no valid existence, or that the proceedings as set forth in the bill may have been

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without due process of law, is not sufficient to give a court of equity jurisdiction. The facts, as disclosed by the bill, are those which constitute the ordinary relation of principal and agent. Without something more this is not sufficient to give a court of equity jurisdiction. "The mere relation of principal and agent without more,—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law,—is insufficient to enable a principal to maintain the action against his agent. * * * But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction." (Pomeroy's Eq. Jur. Sec. 1421, note 1.)

The bill fails to disclose any fact or reason whatsoever why the plaintiff's claim "cannot be conveniently and properly adjusted and settled in an action at law." (R. L. Sec. 1834.)

See *Warner v. McMullin*, 131 Pa. 370, 381; *Taylor v. Turner*, 87 Ill. 296, 302; *Crothers v. Lee*, 29 Ala. 337, 341; 22 Ency. P. & P., 15, 17.

Having, therefore, reached the conclusion that there is no equity in the bill, other questions raised by the demurrers will not be considered.

The order appealed from is reversed and the demurrers are sustained, provided, that the plaintiff may have five days within which to file an amended bill, should she be so advised; otherwise the bill to be dismissed.

A. L. Castle and G. A. Davis (Castle & Withington and G. A. Davis on the brief) for plaintiff.

C. F. Peterson for defendants.

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MARY KAHAI v. YEE YAP.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 1, 1910.

DECIDED JULY 7, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

COURTS—*opinions—written statement of reasons.*

The provision of R. L., §1747, as amended by Act 117 of the Laws of 1909, relating to a statement of the reasons for the decision of the trial court in jury waived cases is mandatory and the failure to comply therewith is reversible error.

OPINION OF THE COURT BY PERRY, J.

This is an action to quiet the title to a piece of land situated in the City of Honolulu. Judgment was for the defendant. Of the plaintiff's exceptions all have been expressly abandoned save those which were taken to the decision and the judgment on the ground that they were contrary to the law and the evidence and the weight of the evidence, and under these exceptions the only points argued are that the evidence was insufficient to support a judgment for the defendant and that the decision and judgment cannot stand because the decision, although in writing, does not set forth the trial court's reasons therefor.

The decision, after reciting the facts of the appearance of counsel for the respective parties and of due trial having been had, continues: "The court having heard the evidence adduced and the argument of counsel and being fully advised in the premises finds that Mary Kahai, plaintiff above named, is not entitled to the relief prayed for in the amended complaint herein and therefore gives judgment in favor of defendant and against the plaintiff, with costs taxed in the sum of \$41.85. Let judgment be entered accordingly." Cases may arise in which it is difficult to determine whether the written decision contains a sufficient statement of the reasons leading to the con-

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clusion reached, but in this instance there can be no doubt that no reasons are stated. Nothing but the bare legal conclusion and order is set forth. The statute on the subject, R. L. §1747, as amended by Act 117 of the Laws of 1909, reads in part as follows: "Decision by court in writing. In such case the court shall hear and decide the cause, both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor." This provision is mandatory with reference not only to the fact of the decision being in writing but also to the statement of the reasons. There is good ground for such a requirement. As was said in the case entitled *In Re Lewers & Cooke, Ltd.*, 19 Haw. 334, 335, "The making and filing of such statements * * * is of material assistance to the appellate court. In jury waived cases particularly it sometimes happens that the decision is so brief as to afford no clew as to the matters of law and fact passed upon, and that it is possible to support the decision upon a view of the facts which, while sustained by some of the evidence, is so completely contradicted by other testimony that it was in all probability not the real ground for the decision. The appellate court, while satisfied that in all probability the decision was based upon a true view of the facts and an erroneous application of principles of law, is obliged to sustain the decision because there is some testimony to support an improbable view of the facts." It is not without significance that the act of 1909, adding the requirement of a statement of reasons, was passed very shortly after the filing of the opinion in the *Lewers & Cooke* case. Whether the decision under consideration is void by reason of the omission referred to we need not say. It is at least voidable and the present is a direct attack. The omission constitutes reversible error.

It is unnecessary, however, to order a new trial. No error now relied upon is claimed to have occurred prior to the rendition of the decision. It will be sufficient, reversing the judg-

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ment, to remand the case for entry of a decision which will comply with the requirements of the statute. This was the course followed in *Maalo v. Kaiapa*, 11 Haw. 705. See also Revised Laws, §§ 1867 and 1630. But we are not to be understood as intending to place upon the trial court limitations as to procedure which would not exist if the case were now before it for the first time for decision. Upon being remanded, the case will stand in the same condition as it was in originally upon the close of the evidence. The trial court may now, as then, upon application of either party or of its own motion, admit further evidence if in its opinion the interests of justice shall so require. If, as suggested at the argument in this court, the decision below was solely on the ground that there was not sufficient evidence upon which to base a finding as to the precise location of the land involved, the trial court itself may well desire to call for further evidence upon the point and of course should do so if the ends of justice require it. If the title is in the plaintiff it should not be permitted to be lost for mere insufficiency of evidence which is obtainable, if it is obtainable.

The exceptions are sustained, the decision and judgment set aside and the cause remanded for the entry of a decision in accordance with the provisions of Act 117 of the Laws of 1909, without prejudice, as above stated, to the right of either party to apply for leave to introduce, or of the court to request or admit, further evidence, and without prejudice, also, to the right of either party to take exceptions to such decision when rendered, or to the right of the plaintiff, if she shall be the appellant, to incorporate in her new bill of exceptions the exceptions already noted at the trial.

W. C. Achi for plaintiff.

J. Lightfoot for defendant.

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TERRITORY OF HAWAII v. KUM FOO SUNG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 12, 1910.

DECIDED JULY 19, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HARTWELL, C.J.

NEW TRIAL—*newly discovered evidence—diligence.*

Affidavits in support of motion for new trial on the ground of newly discovered evidence should show positively, not only that the evidence was not known before the verdict, but that the applicant or his attorney used due diligence to discover and produce the new evidence at the trial.

NEW TRIAL—*evidence—cumulative, impeaching and material.*

Affidavits must also show affirmatively that the new evidence is not merely cumulative to the evidence adduced at the trial, nor merely impeaching in character, and that it is material.

OPINION OF THE COURT BY DE BOLT, J.

The defendant was convicted of assault and battery on one, C. August Herring, upon an indictment charging him with the crime of assault and battery with a weapon obviously and imminently dangerous to life, "to-wit, a large stick."

The defendant moved for a new trial, one ground assigned, and the only ground now relied upon, being that of newly discovered evidence, which, it is claimed, bears upon the fact as to whether or not the complaining witness, Herring, threatened defendant with a pistol at the time of the alleged assault. The defendant testified at the trial that Herring threatened him with a pistol, and that he only used the stick to knock the pistol from Herring's hand and in self-defense, all of which Herring denied. Herring also further denied upon cross examination that he was in the habit of carrying a pistol, or that he had threatened to shoot others. Defendant thereupon introduced witnesses who testified that Herring was in the habit of carry-

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ing a pistol and that he had threatened to shoot others.

In support of his motion for a new trial the defendant filed the affidavits of Mr. Lorrin Andrews, his counsel, Mr. J. M. Camara, Wong Sar and Chun Loi. The affidavit of counsel being as follows:

"Lorrin Andrews being duly sworn deposes and says: That he is the attorney for the defendant, Kum Foo Sung; that the information contained in the affidavits attached hereto was not within his knowledge at the time of the trial of the above entitled case, and that he had no means of obtaining the same, or reason to believe that such testimony existed before the conclusion of the said case; that after the conclusion of said case he was informed that one, E. K. Bull, Manager of the Oahu Plantation, at Waipahu, had been threatened by said Herring with a revolver, or knew of other persons who had been so threatened; that he at once communicated with the said Bull, who informed him that he personally did not wish to make any affidavit concerning said Herring, as said Herring was a dangerous man, thoroughly irresponsible, and that he knew that if he should make such affidavit said Herring would cause him a great deal of trouble; he, however, informed deponent of the facts which led to the obtaining of the attached affidavits."

The affidavits of the other affiants were, in substance, that Herring was in the habit of carrying a pistol; that he had threatened many people, particularly Chinese, with a pistol; that he had the reputation of having shot the woman with whom he lives; that on one occasion he drove some laborers from certain land with a club, and upon their employer protesting, Herring knocked him down, drew a pistol and threatened to kill him; that he is generally considered a man of bad reputation, always threatening to commit violence on the least provocation, and that the whole community is afraid of him.

The motion for a new trial being overruled the defendant duly excepted. This is the only exception now before us, other exceptions taken having been abandoned.

It will be observed that the defendant, although a resident of the same locality with Herring, failed to show by affidavit

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or otherwise that he himself did not know of the proposed evidence, or that he made any effort to procure the same, or that it could not have been obtained by the exercise of due diligence. His failure and silence in this respect is not explained, nor is it in any way accounted for. (*Rep. Haw. v. Carvalho*, 10 Haw. 446, 450.) In this respect the affidavits filed by the defendant were likewise wholly insufficient. They failed to show that any attempt was made by any one to procure the evidence before the trial. An affidavit should show positively, not only that the evidence was not known before the verdict, but that the applicant or his attorney used due diligence to discover and produce the new evidence at the trial. Evidence discovered soon after the trial by systematic inquiry or search, as in the case at bar, usually indicates that due diligence was not exercised to discover it before the trial. (19 Cyc. 886, 892, 996.)

The crime charged is alleged to have been committed February 10, 1910. The indictment was presented and filed March 16. Arraignment March 18. Trial and verdict May 2. Motion and affidavits for new trial presented May 10. Thus, it is apparent that defendant had ample time and opportunity to prepare for his defense. And, in view of the questions put to Herring by counsel for defendant on cross examination relative to carrying a pistol and his supposed threats to shoot others, we must assume that defendant had some knowledge of these matters before or at the time of the trial. However that may be it was his duty, nevertheless, to have made some attempt to procure evidence for his defense at the trial and not wait until the verdict had gone against him.

The affidavits are also wholly insufficient in that they do not show that the so-called newly discovered evidence is not merely cumulative of the evidence adduced at the trial, nor merely impeaching in character. To say nothing of the fact that the proposed evidence was immaterial, it is too plain for argument that it is merely cumulative and impeaching in character.

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The question of newly discovered evidence in its various phases has been before our courts many times.

See *Walker v. Grimes*, 1 Haw. 54; *Howland v. Jacobs*, 2 Id. 155; *In re Will Hewahewa*, Id. 165; *Weston v. Montgomery*, Id. 309; *Lipoa v. Dowsett*, 3 Id. 623; *Makea v. Nalua*, 4 Id. 205; *Burns v. Bowler*, Id. 303; *Briggs v. Mills*, Id. 450; *Malani v. Puki*, 5 Id. 504; *Abela v. Louika*, 6 Id. 57; *Kahula v. Kuamu*, Id. 226; *Kepola v. Aholi*, Id. 302; *Clement v. Cartwright*, 7 Id. 676; *The King v. Awana*, Id. 305; *Gay v. McCandless*, Id. 365; *Napahoa v. Chinese Union*, Id. 379; *The King v. Makamaka*, Id. 394; *Kaheana v. Nalimu*, 8 Id. 271; *Rep. Haw. v. Saku Tokuji*, 9 Id. 548; *Hang Fook*, Id. 553; *Charman v. Charman*, 19 Id. 380.

Exception overruled.

J. W. Cathcart, City and County Attorney (*F. W. Milverton*, Deputy City and County Attorney with him on the brief), for the Territory.

Lorrin Andrews for defendant.

MARY A. RICHARDS v. CARL ONTAI, HENRY ONTAI
AND JAMES ONTAI, DOING BUSINESS UNDER
THE NAME OF ONTAI BROTHERS.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 13, 14, 15, 1910.

DECIDED JULY 20, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

ARBITRATION AND AWARD—conclusions of arbitrator not reviewable on appeal.

On an appeal from the decision of a circuit court causing an award by an arbitrator to be entered as a judgment, the correctness of the arbitrator's findings of fact and rulings of law cannot be in-

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quired into, the only issue being whether the award was made in accordance with the terms of the submission or was made by collusion or fraud.

COURTS—*jurisdiction—none, as to subject matter, by mere consent.*

A clause in the submission allowing an appeal from rulings of law cannot of itself give jurisdiction to this court where none is conferred by law.

OPINION OF THE COURT BY PERRY, J.

The parties entered into an agreement to submit certain controversies to arbitration and to have the award when rendered entered up as a judgment of the circuit court of the first circuit. It is apparent on the face of the agreement that the parties in executing it and in providing for the subsequent procedure in the matter proceeded under Ch. 142 of the Revised Laws. The submission was acknowledged before a judge of the circuit court of the first circuit and was entered as a rule of court and the award was filed by the arbitrator in that court. Subsequently the plaintiff filed a motion in the same court that the award be entered as a judgment of the court in the case and, no opposition being made thereto, the motion was granted and the award entered as prayed for. From the decision of the judge ordering the award to be so entered the defendants appeal to this court. It is clear from the terms of the submission that all questions of law as well as all questions of fact involved in the issues therein specified were thereby submitted to the arbitrator for his decision. Both parties argued at length in their briefs the correctness of the rulings of law made by the arbitrator with which the defendants are dissatisfied, no mention being made by either party of the jurisdiction of this court on an appeal to consider those questions. In the agreement it is provided "the award of the arbitrator shall be subject to appeal by either party as to matters of law." The court itself at the oral argument suggested the question of lack of jurisdiction in the matter. The appellants contend

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that all of the arbitrator's rulings of law are reviewable on this appeal while the appellee, feeling bound by the terms of her agreement, presents no argument to the contrary.

The question is one not of policy but of statutory construction. But little assistance can be had from decisions in other jurisdictions rendered either in the absence of statute or upon statutes whose provisions differ from those of our own.

The appellants rely, in part at least, upon R. L. Sec. 1859 as conferring the right of appeal. It is to be noted, in the first place, that that section relates only to appeals from judgments of circuit judges *in chambers*. The decision and judgment in the case at bar were not rendered by a judge in chambers. The provision of the submission is that the award shall be entered up as a judgment of "the first circuit court of the Territory of Hawaii." The order entering the submission as a rule of court is under the title of the "Circuit Court, First Circuit, Territory of Hawaii, January Term, 1910," and the award, the motion and the judgment are all entitled and filed in the same court at term. For another reason, also, Sec. 1859 does not apply. It is general in its provisions, relating to appeals generally. In the chapter on arbitration specific provision is made concerning appeals from awards when entered as judgments. Sections 2196 and 2198 read as follows:

"Sec. 2196. Award entered as judgment, when. Upon the coming in of the award, either party may, after four days notice to the other party, move the district magistrate or any judge of the court of record, as the case may be, to cause the award to be entered up as a judgment of court; and unless the other party shall satisfy the judge that the award has not been made in accordance with the terms of the submission, or that it has been made by collusion or fraud, he shall cause the same to be entered up as a judgment of court; but if the opposing party sustains his objections to the satisfaction of the judge, he shall declare the award null and void."

"Sec. 2198. Appeal. Any party deeming himself aggrieved, by the decision of the judge before whom motion is made for

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judgment upon the award, may take an appeal to the supreme court, upon filing written notice of his intention so to appeal, within five days after the rendition of such decision."

Sections 2196 and 2198 are special provisions upon this particular subject, and if they differ, as we think they do, from those of Sec. 1859, the former by the well known rule must prevail. Certainly the jurisdiction of the circuit court or judge is limited to the ascertainment of whether or not the award is in accordance with the terms of the submission or is the result of collusion or fraud and to the entry of the award as a judgment if he feels satisfied that there was no fraud or collusion and that the terms of the submission have been complied with or to the setting aside of the award if he is satisfied that the contrary was the case. It is not in his power to consider whether the conclusions of the arbitrator either on matters of fact or on matters of law submitted by the agreement are correct. The only appeal allowed by Sec. 2198,—and the rule here applies that the enumeration of one excludes all others—is from the decision of the judge before whom the motion is made, which must mean from the only decision which, under the law, he had authority to make, and to a party who deems himself aggrieved by the decision. A party obviously cannot within the meaning of that section deem himself aggrieved by the failure of the judge to do that which the law specifically provides he has not the power to do. The language of the two sections is plain and unambiguous and under their provisions neither the circuit court or judge nor this court on appeal can review the findings of fact or the rulings of law made by the arbitrator any further than may be necessary to determine the questions specifically mentioned in the statute, that is to say, whether the award is in accordance with the terms of the submission or was made by collusion or fraud.

The statute (at that time Secs. 934, 936, Civil Code of 1859) was similarly construed in 1883 in *Thomas v. Lunakilo Est.*, 5 Haw, 39, 40, although Sec. 859, providing for appeals

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from justices at chambers, was apparently not referred to in that case. The broader jurisdiction on appeal now contended for was urged to exist but the court held in effect, as we now hold, that the jurisdiction was limited to the inquiries mentioned in Sec. 933 (Sec. 2196). See also 3 Cyc. 765, 766; *Batten v. Patrick*, 81 N. W. (Mich.) 1081, 1082; *Deford v. Deford*, 19 N. E. (Ind.) 530, 531; *McCord v. Flynn*, 86 N. W. (Wis.) 668, 671; *Ketcham v. Woodruff*, 24 Barb. 147, 148, 149, and *Anderson v. Taylor*, 41 Ga. 9, 17, 18.

As to the agreement that the award should be subject to appeal by either party as to the matters of law, it is, of course, undoubted that mere consent of the parties cannot confer jurisdiction over the subject matter where none is given by law.

It is not contended that the award on its face fails to express correctly what the arbitrator intended to decide or that he was misled by accident into rendering a decision that he would not otherwise have rendered. The only claim sought to be presented on this appeal is that on the issues of law the arbitrator reached conclusions contrary to those which this court would reach if the matter were before it for determination; and it is expressly conceded in this court, and presumably was also conceded in the circuit court, that the award was in accordance with the terms of the submission and was not made by collusion or fraud. No alternative was left to the circuit court except to enter the award as a judgment of the court and under the law no alternative is left to us on this appeal but to confirm the judgment appealed from.

C. R. Hemenway (*Smith, Warren & Hemenway* on the brief) for plaintiff.

J. A. Magoon (*Magoon & Weaver* on the brief) for defendants.

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RAMON H. MAKEKAU v. S. KANE, TAKACHITA, H. KOBAYASHI, MAN HING CO., ALIAS AHANA, IOSHIDA, M. HINO, TOM SANG CHUNG, KELI-KAPU, BEN KAWAI, MIZUNO, IBAORA AND LAM CHAN.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED JULY 14, 1910.

DECIDED AUGUST 1, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HARTWELL, C.J.

EVIDENCE—*declarations concerning pedigree.*

Declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree.

ID.—*relationship of declarant.*

A qualification of the rule is that before a declaration can be admitted in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself, but such proof may be slight.

ID.—*order of proof.*

The mere order of proof is immaterial. That is a matter resting largely in the discretion of the trial court.

ID.—*declarations not secondary evidence.*

If the declarant is dead, the declarations are not to be excluded merely by reason of the fact that living members of the same family can be examined on the same point.

ID.—*narration of past events, inadmissible.*

A mere narration of past events, not against interest, though made by a claimant while in possession of the land in controversy, is but hearsay and not competent to be proven.

ID.—*receivable only to give character to possession.*

The doctrine that self-serving declarations of a claimant to land are admissible assumes that the declarations were made while the declarant was in possession of the land and that they are not offered except as coloring the occupation and showing that it was hostile.

APPEAL AND ERROR—*instructions—necessity of exceptions.*

A party who fails to object and except to an assumption or omission of certain facts by a trial judge in his instructions to the jury, and who fails to request other instructions on the point, cannot,

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the verdict having been rendered in conformity with the instructions, upon an exception to the verdict on the ground that it is contrary to the law and the evidence, obtain a review of the alleged error in the assumption or omission.

EVIDENCE—sufficient to support verdict.

Upon the evidence in this case a motion for a directed verdict held to have been correctly denied.

Costs—witness fees—defective service of subpoena.

Mileage and witness fees are taxable as costs even though the subpoena is served by an officer not authorized by law to serve it, provided the witness waived the defect, attended and testified.

OPINION OF THE COURT BY PERRY, J.

This was an action of ejectment in which the jury returned a verdict for the plaintiff. The defendants bring the case to this court upon twenty-two exceptions.

Exceptions 1 to 6 inclusive and 14. S. P. Kamakea, the first witness for the plaintiff, gave testimony concerning the relationship of the plaintiff's grantors to Lono, the patentee. He testified in opening that Kamakea was his father and Hulihewa his mother and that his knowledge of the family tree came through his grandfather Kekuuwelu and his grandmother Kamaka, the parents of his father. His testimony was objected to on the ground that there was no evidence tending to show that one of the declarants, Kekuuwelu, was dead or otherwise unable to appear at the trial, and upon the further ground that the relationship of the two declarants Kamaka and Kekuuwelu with the family had not been shown by proof independent of the declaration itself. As to the second ground it is sufficient to say that the plaintiff testified (tr. p. 59) that the defendant Kane told him that he, Kane, was "the son of Kamaka" (the witness probably said "grandson") "and bought Kimo's interest." Meleana Kalili testified (tr. p. 33) that Papala was her mother and that Papala's parents were Kekapa and Kalimaeka, and that Kane was a son of Kekapa. Kane testified (p. 43) that his parents were Kekapa and Kali-

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maeka, and there was other testimony (for example, pp. 36, 37), though slight, tending to show that Kekapa, Kimo, Papala and Kamakea, the father of S. P. Kamakea, were all members of the same family. All of this evidence was admitted, it is true, after the witness S. P. Kamakea had given his testimony, although before the defendants' motion to strike made at the close of the plaintiff's case, but the mere order of proof is immaterial. That is a matter largely in the discretion of the trial court, and upon this point it cannot be said that there was any abuse of discretion in admitting the evidence of the declarations.

The law on the subject of evidence of pedigree is stated in *Fulkerson v. Holmes*, 117 U. S. 389, 397, as follows: "The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent facts must often be proved which occurred many years before the trial and were known to a few persons, it is obvious that strict enforcement in such cases of the rules against hearsay evidence will frequently occasion a failure of justice * * * Traditional evidence is therefore admissible * * * The rule is that declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree * * * A qualification of the rule is that before a declaration can be admitted in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself but it is evident that but slight proof of the relationship will be required since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy." As to the death of Kekuunwelu, evidence of that fact was not a condition precedent to the admission of S. P. Kamakea's testimony. That witness' statement was that the declarations

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came not only from Kekuuwelu but also from Kamaka. There was other evidence, though introduced subsequently, tending to show that Kamaka had died many years ago. Evidence of the declaration was therefore admissible even though Kekuuwelu or other witnesses were living and available who could testify to the same relationship. "The rule had its origin in necessity but now is well established and universal in its application." *Craufurd v. Blackburn*, 17 Md. 49, 54. "Nor do such declarations stand upon the footing of secondary evidence to be excluded where a witness can be had who speaks upon his subject from his own knowledge."—*Ib.* 54. "If the declarant is dead his declarations are not excluded by the fact that living members of the same family could be examined on the same point."—1 Elliott Ev. Sec. 365. See, also, on this subject generally, 2 Wigmore Ev. Sec. 1481, pp. 1841, 1842, 1843; 1 Greenleaf Ev. (16 ed.) Sec. 114 b and c, and 1 Elliot Ev. Sec. 380.

Exceptions 7 and 15. These relate to the admission in evidence of the deed from Kimo to Kane which was offered for the purpose of showing that the defendant Kane and the plaintiff claimed title from a common source, to-wit: from Kamaka. The deed is merely a conveyance of all of the grantor's interest in Lono's kuleana, and the objection advanced is that it is not evidence tending to show that Kane claims under Kamaka and was therefore inadmissible for the purpose for which it was offered. Assuming the objection to be good, the error was not prejudicial or reversible. The admission of the deed must be regarded as having been harmless in view of the fact that the testimony that Kamaka was a sister and one of the heirs of Lono was undisputed.

Exceptions 8 to 13 inclusive and 15. These were noted to the admission in evidence of the following deeds: S. P. Kamakea to plaintiff; Meleana Kalili to plaintiff; Halawale to Kauwahipu; Kauwahipu to Maria P. Kaunamano; Maria P.

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Kaunamano to W. C. Achi, Trustee; and W. C. Achi, Trustee, to the plaintiff. These were offered to prove the acquisition of title by plaintiff of the interests claimed by him in the action. The argument in support of the exceptions is that the deeds, or some of them, contained recitals of pedigree, that no other competent evidence had been introduced tending to show that Kamaka was an heir of Lono and that therefore the deeds were inadmissible. Having already held that the evidence of S. P. Kamakea concerning the relationship of Kamaka to Lono was admissible, these exceptions must be overruled.

Exception 16. At the close of the plaintiff's case defendants moved for a directed verdict on the ground that sufficient title had not been proven on behalf of the plaintiff. The exception was to the denial of that motion. The ruling excepted to was correct for there was clearly evidence justifying a verdict for the plaintiff even though for a smaller fractional interest in the land than was claimed in the declaration.

Exceptions 17 and 18. Kanamu, a witness called for the defendants, having testified that at one time he was in the employ of Kimo, Kane's grantor, planting cane on certain land, presumably the land in question, the following proceedings took place: "Q. Who paid the taxes on the land, if you know? A. Kimo during his lifetime paid the taxes but now Kane pays the taxes. Q. Who collected the rents and profits during the time Kimo was living? A. Kimo. Q. Hear any statements ever made by Kimo as to who owned the land?" This question was objected to and disallowed. On cross-examination the witness testified that Kimo used for his own purposes all of the income which he had collected from the land, and subsequently admitted that Kimo had told him that he had so collected and disposed of the income and that these statements were the witness' sole source of information on the subject. Thereupon a motion by plaintiff to strike out all of the evidence of

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the witness concerning Kimo's collection and disposition of the rents and profits was granted. Exception 17 is to the disallowance of the question and exception 18 to the granting of the motion.

Assuming the law to be, as contended by the defendants, that the declarations made by a claimant, not to the true owner but to a stranger, to the effect that he owned or claimed the land in dispute are admissible, not for the purpose of proving the truth of those assertions but for the purpose of giving character to the possession and of showing that it was hostile (see *Carter v. Lulia*, 16 Haw. 630), the rule, even in the jurisdictions which adopt it in its broadest form, is subject to certain limitations. One of them is that a mere narration of past events is but hearsay and not competent to be proven. *Knight v. Knight*, 178 Ill. 553, 557. Kimo's statement to Kanamu that he, Kimo, had collected all of the rents and profits of the land and had used them all for his own support was a mere narration of past occurrences and inadmissible. Other limitations are that the declarations in order to be admissible must have been made while the declarant was in possession of the premises and that they are not offered except as coloring the occupation, or, in other words, giving character to it and showing that it was hostile. 3 Wigmore Ev. Sec. 1778. The question, "Hear any statements ever made by Kimo as to who owned the land," was therefore correctly disallowed. In the first place it does not appear that it was offered for the sole purpose of giving character to the possession, and in the second place the witness' attention was not called specifically to the time when Kimo was in possession. In answer to the question as stated the witness could well have testified to declarations made when Kimo was out of possession. Nor was any offer made by the defendants to prove by the witness that the declarations were made by Kimo while he was in possession or that they were of a claim of ownership in himself or such as

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to show that his possession was hostile to the title of the true owner.

Exception 19. Evidence was introduced by the plaintiff from which the jury could have found the following facts: that Lono, the patentee, died leaving as his sole heirs his widow Kaiahaehae and his sister Kamaka; that Kamaka had a husband, Kekuuwelu, and left surviving her seven children: Kekapa (w), Lunu (k), Kamakea (k), Kimo (k), Halawale (k), Elia (k) and Kihei (k); that of these Lunu, Elia and Kihei died unmarried and without issue; that Kekapa (w) married Kaliuaeka and had two children, Kane, one of the present defendants, and Papala (w); that Papala married Punohu and had four children: Meleana Kalili (w); Keakilani (w); Wai-lua (w) and Helena (w); that Keakilani died unmarried and without issue; that Kamakea married Huliheua (w) and had the following children: Kauwahipu (k); Lumahai (w); Kamakee (k) and S. P. Kamakea (k); that on August 23, 1903, Kimo conveyed to the defendant Kane all his interest in the land in question which is one of the apanas mentioned in the patent to Lono, and that in 1909 Meleana Kalili, S. P. Kamakea and W. C. Achi trustee conveyed to the plaintiff by separate deeds all of their interest in the land, the deed of W. C. Achi, trustee, including the interests of Halawale and Kauwahipu.

Under this exception, that the verdict was contrary to the law and the evidence, the defendants claim that no evidence was adduced tending to show that Kekuuwelu died before Lunu, Elia and Kihei, or any of them, or even that he was dead at the time of the trial or that Keakilani survived her father Punohu or that any of these four children died under age and that under our statute (R. L. Sec. 2510) if these children did not die under age and left surviving them their respective fathers their shares would pass not to their brothers and sisters but to their respective fathers. We are unable to find reported in

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the transcript any evidence tending to show the date or even the fact of the death of Kekuuwelu, or the date of the death of Punohu, or whether or not they respectively survived their children above named, or tending to show that any of the four children in question died under age and it may be that the law applicable to the subject is as claimed by the defendants at the argument of these exceptions. However that may be, the point is not now open to the defendants. At the trial the presiding judge gave a statement to the jury of the plaintiff's claim on the subject of pedigree substantially as above set forth, omitting, however, in that statement all reference to the fact or date of the deaths of Kekuuwelu and Punohu and of the survivorship of Lunu, Elia, Kihei and Keakilani, adding that the plaintiff claimed that Kamaka had by adverse possession acquired title to the one-half interest of Kaiahaehae, referring to the further claim of plaintiff that the deed of Meleana conveyed "her one-twenty-fourth interest" in the land, speaking of the other interests conveyed to plaintiff as being "Halawale's one-fourth," "S. P. Kamakea's one-sixteenth" and "J. Kauwahu's one-sixteenth," and concluding by saying: "If you find these claims to be substantiated by a preponderance of the evidence you must then find for the plaintiff unless you find" that title by adverse possession was acquired by the defendants. No exception was noted by the defendants to this charge. No objection was made thereto nor was any request presented for any further or different instructions on the subject. The only other issue left to the jury was whether or not the defendants and their predecessor had acquired title to the land by adverse possession. It is clearly apparent from the verdict rendered, from the charge and from the remainder of the record that the jury found that the defendants had not acquired title by adverse possession; that Kamaka inherited a one-half interest and acquired title by adverse possession to the other one-half, and that it accepted as true the plaintiff's evidence, which was un-

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disputed, concerning the pedigree. Under these circumstances the jury had no alternative in view of the instructions given but to render the verdict which it did render. It was under obligation to accept the law as stated by the court. In the absence of an exception the correctness of the instructions will not now be considered for the first time. A party cannot sit by and acquiesce in the law stated by the presiding judge, making no objection to an erroneous assumption of fact, or to an omission to refer to certain facts, and speculate on the chance of a favorable verdict on another issue and then successfully move for a new trial founded upon the alleged errors in the charge or upon the assumption or omission just referred to. Such objections should be made while there is still time to correct the error either by a modification of the charge or by the allowance of further evidence. Assuming that the court erred in its instructions it does not necessarily follow that the jury has failed to accomplish justice by its verdict for it may well be that the fact was that Kekuuwelu and Punohu died before their children, that this fact was known to defendants and that the omission to object to the charge was due to such knowledge. However that may be, the rule must be the same whether the failure to object and except was due to that knowledge or to a lack of vigilance at the trial.

The law here laid down has been well established in this jurisdiction. In *Kanaloa v. Union Mill Co.*, 7 Haw. 547, 548, (1889), the jury was instructed directly to find for the defendants and thereupon without retiring returned an oral verdict in conformity with the direction. Upon the exception to the verdict the court said: "We cannot find either by the bill of exceptions or the record that any exception was taken to the instructions given to the jury by the court, which must be done before the case is left to the jury. Consequently there is no exception taken to the law as charged by the court (and the law must stand as given) and the verdict that was given accord-

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ingly." Referring to the language just quoted the court, in *Gillespie v. McBryde*, 13 Haw. 432, 433 (1901), said: "We understand that this rule has never been modified or overruled and is still in full force and vigor in this jurisdiction." "A verdict is contrary to law, within the meaning of an exception of this nature, when it is contrary to law as claimed and ruled upon at the trial."—*Territory v. Nobriga*, 16 Haw. 29, 32, "It may be that this instruction was erroneous but the error, if any, cannot now be taken advantage of because no request was presented by the defendants for further instructions on the subject and no exception was noted to the judge's failure to instruct or to the instructions as given." *Brown v. Bannister*, 14 Haw, 34, 37. See also *Lihue Plantation v. Kepalai*, 13 Haw. 515, 516; *Case v. Dodge*, 18 R. I. 661, 665; *State v. Rye*, 35 N. H. 368, 381; *Texas & P. Ry. Co. v. Ludlam*, 52 Fed. 94, 96; *Downing v. Glenn*, 26 Neb. 323, 325; *Mayor and Aldermen of Knoxville v. Bell*, 80 Tenn. 157, 161; *R. R. v. Ryan*, 17 Colo. 98, 104, 105; *Murray v. Heinze*, 17 Mont. 353, 361, and *Valerius v. Richard*, 57 Minn. 443, 447.

There was evidence, it will be recalled, tending to show that Kamaka inherited an undivided one-half of the land from Lono, and Kaiahaehae, the widow, the other half. There was also evidence which, while brief and perhaps not of the most satisfactory character, was nevertheless sufficient to support a finding of the following facts: that Lono died in 1858; that not long after Lono's death Kaiahaehae left the land, took up her residence at Waipio and never again lived on the land in question, and that she died not long after Lono's death; that Kamaka died in 1883 or 1884; that Kamaka and after her seven children lived upon the land and occupied it to the exclusion of all others; that from the time of Lono's death neither Kaiahaehae nor any other person under her occupied or in any manner made use of the land or made any claim to it; perhaps also that the period of occupation of Kamaka herself in her

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lifetime was more than twenty years, but however that may be, that the period of occupation by Kamaka and after her by her children was more than twenty years; that at least three of Kamaka's children built on the land, according to one witness three dwelling-houses and according to another witness five dwelling-houses, and that Kamaka and all of her seven children occupied these houses as well as the whole land as one family having equal interests and without any special title or rights in the builders of the houses. In other words, upon the evidence a finding that Kamaka and her seven children acquired by adverse possession title to Kaiahaehae's undivided one-half interest in the land in question cannot be disturbed.

Exception 21 is to the entry of the judgment. The contention is that the verdict, "We the jury in the above entitled cause find for the plaintiff," is to be interpreted as meaning that the jury found that the plaintiff is entitled to the whole land and not merely to a fractional interest therein and that therefore the judgment for an undivided five-twelfths interest is void. While it is true that in the declaration the prayer is for the restitution of "said piece of land" it is clear from the allegations of the declaration that all the plaintiff claims is an undivided five-twelfths interest. Paragraph 2 reads, "That the plaintiff claims the right of immediate possession of and title in fee simple to five undivided twelfths (5-12) of the piece or parcel of land above described," and paragraph 3, "That by reason of the unlawful detention by the defendants of the said five undivided twelfths (5-12) of the said piece of land, the plaintiff has been damaged in the sum of \$1000." The court in its instructions to the jury stated, without objection or exception by the defendants, "The plaintiff in this case, Raymon H. Makekau, claims title in fee simple to an undivided 5-12 of Apana 2 of Grant No. 929 to Lono." The verdict must be read in the light of the issue as framed by the pleadings and recognized in the instructions and can only be construed to be a find-

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ing for the plaintiff for an undivided five-twelfths interest. The judgment was therefore in accordance with the verdict.

Exception 22 is to the denial of a motion for a new trial. The motion presents no questions not already disposed of.

Exception 20. The court allowed as a part of the costs three items of \$48.80 each, being mileage and fees for attendance paid to three witnesses summoned from Honolulu. The objection is that the subpoena was served by a police officer who, it is claimed, under R. L. Sec 1571 is not one of the persons authorized by law to serve such process, that the service was void and that therefore the mileage is not taxable as costs, reference being made in this connection to R. L. Sec. 1891 which reads as follows: "Every witness subpoenaed and attending upon the trial of any civil cause, in any court in this Territory, shall be paid the sum of one dollar for each day's attendance in court, and traveling expenses at the rate of ten cents a mile each way. The fees of witnesses shall be taxable items in the bill of costs to be paid by the losing party. Whatever the rule might have been with relation to proceedings for contempt in the event of a refusal by the witnesses to attend in consequence of the alleged invalidity of service, the witnesses saw fit not to raise the point and obeyed the subpoena. The provision for service by designated officers was designed for the benefit and protection of the persons to be served as well as for the due administration of justice by the courts. It was competent for the witnesses to waive the possible invalidity and having waived it the sums paid to them for mileage and fees are, in our opinion, taxable as costs. *Mattock v. Wheaton*, 10 Vt. 493; *Alexander v. Harrison*, 28 N. E. (Ind.) 119, 120. The object of the provision for payment is to secure, with fairness, the attendance of the witnesses. That object was accomplished and the parties had the benefit of their evidence.

The exceptions are overruled.

W. C. Achi (*Harry Irwin* with him on the brief) for plaintiff.

W. T. Rawlins (*LeBlond & Smith* with him on the brief) for defendants.

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FRANK K. ARCHER v. S. NAKA AND J. SAKEHARA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 1, 1910.

DECIDED AUGUST 5, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HARTWELL, C.J.JUDGMENTS—*estoppel*.

In an action of ejectment a judgment for defendants on demurrer is a bar to a subsequent action for the same piece of land brought by the same plaintiff against the same defendants where the allegations in the declarations in the two actions are the same in all material respects,

In ejectment brought by one holding a leasehold interest the lessor's title in fee need not be alleged in the declaration.

OPINION OF THE COURT BY PERRY, J.

A statement of earlier proceedings in this controversy is contained in the opinion reported in 19 Haw. 547. After the filing of that opinion the same plaintiff commenced this, the third, action against the same defendants for the recovery of the same parcel of land involved in the first and second actions, and the judgment sustaining the demurrer to the declaration in the first action was again pleaded in bar. To the judgment sustaining the plea in this case this exception was noted.

The law of *res judicata* applicable to this plea is sufficiently stated in the former opinion. 19 Haw. 547-548. As in the second case, "the only question is whether plaintiff has supplied in his complaint in this action essential allegations which were lacking in his complaint in the first action." *Ib.* 548. The plaintiff's contention is that the present declaration differs materially from the first in three respects: first, in setting out the duration of plaintiff's lease; second, in containing a description of the land by metes and bounds; and third, in alleging that the plaintiff's lessor, "is and was at the time of the execution of said lease the owner in fee and entitled to the possession of said

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premises described.” (1) The second declaration set forth with as much fullness as the third the duration of the plaintiff’s lease, but this court has already held that that averment is simply an elaboration of what was alleged in the first declaration and adds nothing to it as a pleading in legal effect. (2) The first declaration contained a particular description of the land by metes and bounds. (3) Our statute, R. L. Sec. 1713, relating inter alia to actions of ejectment requires an allegation in the declaration of “the kind of title claimed by the plaintiff” but requires no other averment on the subject. By the unquestioned practice of a long period of years this provision of the statute has been construed as not requiring the plaintiff to set forth the mesne conveyances by which the title passed to him. This construction will not now be departed from. It may be added that an averment that the lessor is the owner in fee is of no greater force or value than an averment that the lessee is the owner of a leasehold interest. If the former were necessary, then it would also be necessary to set forth all of the other links in the chain of title as far back as the patent. The first and third declarations are the same in all material respects. The statement in the conclusion of the former opinion, “we do not intimate that plaintiff may not satisfy the rule of law referred to,” was merely an express limitation of the former opinion to the particular averments then under consideration and cannot be considered as an intimation that the plaintiff *could* satisfy the rule of law in question. The plaintiff was merely left at liberty to make a further attempt if so advised. If the ruling and judgment now pleaded in bar were erroneous, the plaintiff’s remedy was by appeal in the manner provided by law.

The exceptions are overruled.

Alfred L. Castle (*Castle & Withington* and *W. C. Achi* on the brief) for plaintiff.

W. T. Rawlins for defendants.

Vivichaves v. Akau, 20 Haw. 217.

HATTIE K. VIVICHAVES v. Y. AKAU.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 3, 1910.

DECIDED AUGUST 5, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.EVIDENCE—*agreement to reduce rent under lease.*

The evidence in this case held sufficient to sustain a finding that by the terms of an oral agreement by a lessor reducing the rent of the demised premises the reduction was to continue in effect only until otherwise directed by the lessor.

OPINION OF THE COURT BY PERRY, J.

This is an action instituted in the district court of Honolulu for the sum of \$15, balance of rent claimed to be due for the month of November, 1909. On appeal the circuit court, jury waived, found for the plaintiff for the amount claimed and judgment was entered accordingly. The defendant excepts to the decision and the judgment on the ground that they are contrary to the law and to the evidence.

It was admitted at the trial that the defendant is the holder of a lease from the plaintiff for twenty years from June 1, 1900; that the rent reserved by the lease is \$55 per month; that from December 1, 1903, to June 30, 1904, the plaintiff accepted \$50 per month in full satisfaction of the rent, from July 1, 1904, to November 30, 1904, \$45 per month, and from November 30, 1904, to October 31, 1909, \$40 per month; that for the month of November, 1909, the defendant paid to the plaintiff \$40 as rent but refused to pay the additional sum of \$15 claimed by the plaintiff. The defense offered at the trial and on these exceptions is that in or about the month of December, 1904, the plaintiff, through an agent, in consequence of a complaint by the defendant that he was for certain reasons

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stated unable to pay more than \$40 per month rent, agreed to reduce the rent to that sum. The defendant was the only witness who testified in support of this alleged agreement. On the other hand, the plaintiff's agent testified, "I told him I would *for the time being* help him out" by reducing the rent to \$40 "and he says 'all right,'" and added that he was positive that he used the words "for the time being." The trial court in its opinion said, "The only question is to determine whether or not the reduction of rent reserved was made in December, 1904, as claimed by the tenant, defendant herein. The defendant testified that at that time no reference was made to the reduction of the area of the land leased as the reason for the claim for reduction, but does say that he desired a reduction because of hard times. At that time, December, 1904, the lease had sixteen years yet to run, and I do not imagine it was in the mind of either party that the hard times would continue for the remainder of the term of the lease, 16 years. In my judgment no matter what was said at the time of this acceptance of \$40 for the month previous it was not consented that this reduction was to continue during the entire balance of the term of the lease." This is in effect a finding that the agreement of the parties was, not that the rent was thereby reduced for the remainder of the term of the lease, but that it was reduced only for the time being, in other words, that under the terms of the agreement as made the lessor was at liberty at any time to require the payment of the full amount of the rent reserved under the lease. The evidence was contradictory,—perhaps even the testimony of the plaintiff's agent was contradictory in itself—but there was certainly evidence to support the finding as made and under the repeated decisions of this court the finding cannot under the circumstances be disturbed. Under the finding, the plaintiff was at liberty in November, 1909, to require the payment of rent at the rate of \$55 per month.

Since the trial court found that an agreement was not made

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to reduce the rent for the remainder of the term it is unnecessary to say whether the sale by the lessor to the Territory of a strip of the demised property for street purposes constituted a consideration for the agreement or whether a valid consideration is otherwise shown by the record.

The exceptions are overruled.

Geo. S. Curry (*A. J. Judd* with him on the brief) for plaintiff.

A. L. C. Atkinson (*Atkinson & Quarles* on the brief) for defendant.

JOHN K. SUMNER v. A. V. GEAR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED AUGUST 1, 1910.

DECIDED AUGUST 10, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

EQUITY—*decree.*

A decree bearing date July 1, but signed and filed on July 7, takes effect on the latter date and not before.

If the form of decree was actually signed on July 1, but not filed until July 7, it did not take effect as a decree until the latter date.

Id.—*appeal.*

An appeal filed on July 5, purporting to be from a decree rendered on July 1, but which decree was not signed and filed until July 7—at least not filed until the latter date, was premature and invalid.

OPINION OF THE COURT BY DE BOLT, J.

This cause came before us on complainant's motion to have the interlocutory appeal of respondent placed on the calendar and dismissed for want of prosecution. While counsel were arguing this motion the court suggested the question as to

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whether or not the appeal was taken prematurely, and this latter question also was argued.

It appears from the record sent up that while the cause was pending before the circuit judge on complainant's bill and respondent's demurrer, respondent, on July 5, 1910, filed his notice of appeal "from the decree * * * rendered in said cause upon the 1st day of July, 1910, overruling the demurrer," which appeal was allowed by the circuit judge.

The record also shows that on July 7, two days after the notice of appeal had been filed, the circuit judge signed and filed a decree, dated July 1, overruling the demurrer.

If the form of decree was actually signed on July 1, but not filed until July 7, it did not take effect as a decree until the latter date. Respondent contends, however, that this decree should be considered as having been entered on July 1. He bases this contention upon the ground that the circuit judge orally overruled the demurrer on that day and that the decree having been dated the same day, it follows that it should be considered as having been entered accordingly, although actually signed by the circuit judge and filed on July 7.

While the power to enter judgments, decrees, and orders *nunc pro tunc* in furtherance of justice is inherent in the courts, both at law and in equity, and is not dependent for its existence upon any statute, still, the exercise of this power may not be invoked as a matter of course, but is governed by well defined rules.

It would seem that before one has the right to invoke the exercise of this power it should be made to appear affirmatively that the delay was occasioned either by the court or by the opposite party, and not by the party himself. See 1 Freeman on Judgments, Ch. III; *Gray v. Brignardello*, 1 Wall. 627, 636; *Mitchell v. Overman*, 103 U. S. 62, 64, 65; 16 Cyc. 475, 476; and 5 Ency. P. & P. 951.

In the case before us it does not appear that either the court

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or the complainant was in any way to blame for or occasioned the delay. It was within the power, as well as the duty, of respondent to seasonably prepare and present a draft of the proposed decree to the judge for signing and filing. Having failed so to do he has no reason now to complain. See 5 Ency. P. & P. 1033, 1034, 1035; *McCandless v. Carter*, 18 Haw. 218, 220.

Respondent also contends that his appeal is good on the ground that an appeal lies from the supposed oral order of the circuit judge, which he claims was made and noted by the stenographer on July 1, overruling the demurrer. Be that as it may, we cannot now consider that question as the supposed oral order or ruling was not made a part of the record sent up, hence, it is not before us. In this respect the record fails to show that any order, ruling, decision or decree was made or entered on July 1, or at any time prior to July 7.

Hence, from whatever point we view this appeal the conclusion seems inevitable that it is invalid, because not taken from the decree actually filed and entered, nor from any decree. So far as the record before us shows, at the time respondent filed his notice of appeal, no decree had been made or entered. His appeal was premature. See 2 Cyc. 805; 5 Ency. P. & P. 1046; *Mutch v. Holau*, 5 Haw. 314; *Un Wo Sang Co. v. Alo*, 7 Id. 673; *In re Estate of Walters*, 10 Id. 25, 27; *Barthrop v. Kona Coffee Co.*, 10 Id. 398; *Kahai v. Kuhia*, 11 Id. 3, and *Farley v. Makee Sugar Co.*, 18 Id. 267.

The motion to dismiss for want of prosecution need not be considered. The appeal is dismissed for the reasons stated in the opinion.

W. W. Thayer for plaintiff.

W. S. Edings for defendant.

Territory v. Nakamura, 20 Haw. 222.

TERRITORY OF HAWAII *v.* NAKAMURA, TABATA,
YOSIHARA, MASU, SATO, FUGI, FUKUDA,
YAMASAKI, KAMI, UEKI, ISHIMURA, ISHIONA,
YONAKIDI AND IWAMOTO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED AUGUST 31, 1910.

DECIDED SEPTEMBER 6, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HARTWELL, C.J.

NEW TRIAL—*exhibition of dice not connected with case.*

Defendants were charged with being present at a place where a gambling game was being played. The evidence and claim of the prosecution was that the game was one played with cards. During the presentation of the case for the Territory, the prosecuting officer permitted certain dice, concerning which no evidence was adduced, to remain on a table in the court-room within view of the jury. Held, not a ground for a new trial.

EVIDENCE—*sufficient to support verdict.*

The evidence in the case held sufficient to support the verdict.

OPINION OF THE COURT BY PERRY, J.

The record does not disclose the precise language of the charge against the appellants. Apparently it was, in substance, that they, with two others, were present on a day named at a place where a game at which money was lost and won was being played. The trial was before a jury. Two of the original defendants were acquitted. The fourteen who were convicted bring the case to this court, the only exceptions being that the verdict is contrary to the law and to the evidence and that the prosecution improperly permitted to be exhibited on a table in the court-room during the progress of a part of the trial seven dice concerning which no testimony whatever was given in the case.

McDuffie, the officer who was in charge at the time of the arrest of the defendants, testified in effect, *inter alia*, that with

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four other officers he had made the raid in question, at half-past one in the afternoon on the day named in the charge; that on approaching the room where the game is claimed to have been carried on he looked for about a minute through a knot-hole in the outer wall and by that means saw three or four men seated on or near a bunk in the room holding cards in their hands, and that he also saw one of the men pass money, either a fifty-cent piece or a twenty-five-cent piece, to another of those holding cards; that with some of the other officers he then went into the room and arrested all of the sixteen defendants. There was other evidence tending to show that the room was fourteen feet in width by twenty-four feet in length; that about its center stood an ordinary billiard table and that the bunk referred to was at the end of the room nearest the knot-hole. Testimony adduced by the defendants themselves was to the effect that all of the defendants were present in the room at the time of and immediately preceding the arrest and that five or six of them were seated on or near the bunk. Kellett, one of the officers, testified that on reaching the house he took a position at a certain opening on the westerly side of the house and from that point saw five or six men at the bunk, saw cards dealt to them and saw some of them place money (silver dollars) on their cards; that at this juncture McDuffie entered and made the arrest, and that at the time of the arrest two of the defendants admitted to him that they had been playing fuchikau (a Japanese gambling game). There was also testimony descriptive of the game of fuchikau.

The defendants' claim on the exceptions is that there were grave contradictions between the evidence of McDuffie and that of Kellett and between different parts of the testimony of Kellett; that, as testified to by witnesses for the defense, it was a physical impossibility for either McDuffie or Kellett to have seen from the positions and through the openings de-

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scribed by them the things which they said they saw, and that the jury should have disregarded all of this evidence as unworthy of credence. Whether the jury reconciled the evidence of McDuffie with that of Kellett on the theory that McDuffie saw the end of one game and Kellett the beginning of another, or whether it disregarded in the main the evidence of one of these witnesses and accepted that of the other does not appear, but it was at liberty to follow either course. It is within the province of the jury alone to pass upon the credibility of the witnesses and the weight of their evidence, and if the jury in this case was able to reconcile the evidence of the two witnesses referred to, or, while disregarding the testimony of one, accepted as true the essential parts of the testimony of the other, the conclusion so reached cannot be disturbed by this court. The same is true of the conflict between the testimony of witnesses for the prosecution and that of those for the defense as to the possibility of seeing through the knot-hole or through the westerly opening to the extent claimed.

It is not necessary in order to sustain a conviction that any witness should say specifically that the money was passed as a part of the gambling game. The circumstances testified to were such as to justify reasonable men in finding that the money was so passed and was not in payment of an ordinary obligation.

The fact that the dice were in the view of the jury during the earlier part of the trial was not complained of or called to the court's attention until the close of the case for the prosecution, at which time their exhibition was made one of the grounds of a motion for a directed verdict. The dice were then removed from view. The testimony for the prosecution related solely to a game played with cards. There was no evidence or claim of the use of dice in the game. Under all of the circumstances of the case it would be an unwarranted re-

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flection on the intelligence of the jurors to hold that they were in any degree prejudiced in their consideration of the case by the view which they had of the dice on the table.

The exceptions are overruled.

J. W. Cathcart, City and County Attorney, for the Territory.

J. Lightfoot for defendants.

GEORGE SEGELKEN v. HAWAIIAN TRUST COMPANY, LIMITED, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF CHARLES W. BOOTH, DECEASED, AND IDA ELIZABETH HALL.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JULY 13, 1910.

DECIDED SEPTEMBER 13, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

EQUITY—payment of claim a charge on trust fund—not barred by lapse of time.

H., owner of an interest in land, subject to dower of L. in the entire land, mortgaged her interest to S. Suit was brought to partition the land, H., L. and S. being made parties. The court, by consent of all the parties, ordered the land sold and decreed that two-thirds of the proceeds be divided among the parties, the share of H. to be applied in part payment of the claim of S. and the remaining one-third to be invested by a trustee, the income to be paid to L. during her life, and at her death the trust fund to be divided in the same manner the two-thirds had been, the share of H. to be charged with the payment of S.'s claim. The decree was entered August 16, 1882. L. died June 17, 1908. This suit was begun April 16, 1910.

Held, that the claim against the trustee was not enforceable until the death of L., and that it is not barred by lapse of time.

Segelken v. Hawaiian Trust Co., Ltd., 20 Haw. 225.

OPINION OF THE COURT BY DE BOLT, J.

This is an interlocutory appeal brought by Charles W. Booth, one of the original respondents, from a decree overruling his demurrer to the complainant's bill in equity for an accounting. Since the appeal was taken Mr. Booth deceased. His death having been duly suggested, the Hawaiian Trust Company, Limited, a corporation, as administrator with the will annexed of the estate of Charles W. Booth, deceased, has been duly substituted as a party respondent in this cause in the place and stead of Charles W. Booth, deceased.

The facts alleged in the bill are, in substance, that the respondent, Mrs. Ida Elizabeth Hall, being the owner of a one-eighth interest in certain land, subject to the dower right of Mrs. Anne Long in the entire land, mortgaged her interest to the complainant, Segelken, to secure the payment of the sum of \$4000; that thereafter a partition suit was brought by other parties also interested in the land to which suit Mrs. Hall, Mrs. Long and Segelken were made parties; that by consent of all the parties to the suit an order was entered directing that the land be sold and the proceeds divided among the parties according to their respective interests; that pursuant to this order the land was sold and the proceeds returned into court for division; that thereafter (August 16, 1882), also by consent of all the parties, a decree was entered directing that two-thirds of the proceeds of the sale of the land be divided among the persons therein named, Mrs. Hall being one of those, but that her share, \$3660.42, be applied as follows: \$533.35 in payment of a certain claim and the balance, \$3107.70, in part payment of the Segelken mortgage, which, with interest, amounted to the sum of \$4248.90; that upon the payment of this sum of \$3107.70 Segelken, in accordance with the terms of the decree, executed a release of his mortgage to the purchasers of the land; that the remaining one-third of the proceeds of the sale, \$14,700, was decreed to be

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invested by a trustee and the income thereof to be paid to Mrs. Long as dower during her life, and upon her death to be divided in the same manner as the two-thirds had been, the share of Mrs. Hall, however, to be charged with the payment to Segelken of the sum of \$1141.83, with interest, being the balance due him on the mortgage debt; that the respondent Booth having been duly appointed trustee, Mrs. Hall's share in the trust fund came regularly into his hands; that Mrs. Long died June 17, 1908, at which time there was due the complainant from Mrs. Hall the said sum of \$1141.83, with interest, which was a charge upon Mrs. Hall's share in the trust fund in the hands of the respondent Booth; that the respondent, Mrs. Hall, claims some interest in the trust fund, but that her claim is subject to complainant's claim. No relief, however, is sought as against her.

The bill prays for an accounting and for general relief.

The ground of the demurrer is, that the complainant's claim is barred by lapse of time, the contention being, first, that the claim having been made a charge upon Mrs. Hall's share in the trust fund, the law of mortgages on real estate applies, and that Segelken's remedy was by a suit in equity to foreclose against this share and having failed to thus proceed within the statutory time, i. e., within ten years from the entry of the decree, his claim is barred.

The respondent next contends that in any event the decree, under the provisions of section 1975 of the Revised Laws, must be presumed to have been satisfied, as more than twenty years have elapsed since it was entered.

Even though, upon the facts as disclosed by the bill and the decree, the complainant's claim could correctly be regarded as a mortgage, still, by the plain language of the decree, which alone declares and fixes the rights and obligations of the respective parties, the claim against the trustee was not enforceable during the life of Mrs. Long, but only after her

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death. The decree thus declares, after providing for the payment to one Wahinealoha a certain part of the trust fund of \$14,700 on the death of Mrs. Long, that Mrs. Hall and seven others "are entitled to the residue of the said sum in equal shares and proportions, being one-eighth each, payable on the death of the said Anne Long, subject, however, as respects the share of" Mrs. Hall, to the charge of the complainant's claim.

The mortgage was released. The duties of the trustee and the rights of the complainant, as between themselves, were, as we observe, fixed and determined by the decree. The payment of the claim out of the trust fund was made to depend upon the right of the complainant to make demand therefor and upon the duty of the trustee to comply with such demand. This right on the part of the complainant as well as the duty on the part of the trustee were brought into existence only by the happening of the event expressly provided for by the decree, namely, the death of Mrs. Long.

Nor, as we view the questions before us, can the decree be considered as one of those contemplated by, or, in any sense whatsoever, as coming within the provisions of Sec. 1975, R. L. The complainant is not proceeding upon the decree in the sense of seeking to have it satisfied. He is proceeding against the trustee seeking to have him required by order of court to perform his duties in the premises as prescribed by the decree. However, be that as it may, complainant's claim, so far as the trustee is concerned, was not enforceable at the time the decree was entered, nor at any time thereafter prior to the death of Mrs. Long. His right to demand payment and the corresponding duty of the trustee to comply therewith did not accrue until the death of Mrs. Long on June 17, 1908, the happening of which event, as provided for in the decree itself, was a condition precedent to his right to maintain any suit on the claim. Neither had the trustee any right or authority to pay the complainant's claim before it accrued, i. e., before

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the death of Mrs. Long. The widow also had the right to insist on the payment of the income on the entire sum of \$14,700, and in the manner and by the trustee provided for in the decree. Hence, it is clear that the claim, from whatever point we may view it, is not barred by lapse of time.

Applying the doctrine that equity follows the law, the facts alleged bring the case clearly within the rule, that "when the payment of a claim or the liability of a party is made dependent upon the performance of any condition precedent or the happening of any contingency, a right of action does not accrue, or the statute begin to run, until the performance of such condition or the happening of such contingency." (Wood on Lim., 226, 363.)

Hence, we conclude that the complainant's claim against the trustee is not barred by lapse of time, and that the decree of the circuit judge overruling the demurrer was correct.

The decree therefore is affirmed and the cause is remanded for further proceedings not inconsistent with this opinion.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for complainant.

P. L. Weaver (*Magoon & Weaver* on the brief) for respondent Hawaiian Trust Co., Ltd.

TERRITORY OF HAWAII *v.* PONG CHONG, ALIAS
PAIPU, AND CHONG DUCK, ALIAS AKAKA.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

ARGUED AUGUST 26, 1910.

DECIDED SEPTEMBER 13, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

EVIDENCE—*supports verdict—inferences.*

There being evidence of certain facts, if believed by the jury, from which facts inferences of guilt could reasonably have been drawn by the jury, the verdict cannot be set aside.

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Court—comment on evidence.

It is not error for the court to rule in the presence of the jury that certain evidence is competent, relevant and material, or that the circumstantial evidence adduced is sufficient to require submission of the case to the jury.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to the circuit court of the third circuit.

The plaintiffs in error, referred to in this opinion as the defendants, were convicted of burglary in the second degree upon an indictment charging that at Niulii, district of North Kohala, in the County of Hawaii, on December 4, 1909, in the day time, they did unlawfully, feloniously and burglariously enter the room of one Ah Su with intent to commit larceny therein, and did then and there unlawfully and feloniously steal, take and carry away money and coin of the value of \$1800, the property of Ah Su.

The court sentenced the defendants to imprisonment at hard labor for a period not exceeding ten years and not less than five years.

The assignments of error now relied upon, all others having been abandoned, are: that the evidence does not sustain the charge, and is not sufficient to sustain the conviction; that the court erred in expressing, in the presence of the jury, the opinion that the testimony of the witness, Sam Kaluna, was material; that the court erred in commenting upon the testimony of the witness Kahai Mersberg.

1. The case is one of circumstantial evidence, there being evidence from which the jury could find the following facts: That the defendant, Pong Chong, occupied a room in Ah Su's building as a tailor shop; that he also had a bed in the storeroom in the same building where he slept; that Ah Su's bedroom was in the rear of the storeroom, from which it was separated by a partition about nine feet high, there being an open

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space between the top of the partition and the ceiling; that Ah Su kept his money in a trunk in his bedroom, which fact Pong Chong knew; that on December 4, 1909, Ah Su had \$1600 in gold and some two or three hundred dollars in silver in his trunk in his bedroom; that he was absent from his premises on the afternoon of December 4th from about 2:30 o'clock until five o'clock; that between three and four o'clock of that afternoon, Pong Chong was seen to open the back door of the storeroom and "peep" out at one Sun Keon, who was engaged in certain work in the rear of the premises, and immediately step back into the storeroom and close the door; that soon thereafter Sun Keon had occasion to go into the storeroom where he saw Pong Chong take a box from a shelf against the partition already mentioned, place it near this partition and get upon it, and upon being asked what he was doing said he was looking for a rat; that at about the same time, i. e., between three and four o'clock, the defendant Chong Duck was seen in the rear of the premises standing near the window of Ah Su's bedroom with a bag over his shoulder; that upon Ah Su's return at about 5 P. M. he went to his bedroom, found the window, which he had closed before leaving, open, the lock of his trunk broken and \$1800 of his money, which was in a bag, gone; that Pong Chong was not on the premises when Ah Su returned, but arrived soon thereafter, and upon Ah Su calling his attention to the fact that his money was missing Pong Chong said nothing and very soon thereafter disappeared from the premises; that between seven and eight o'clock that evening the defendants were seen in Chong Duck's house, which was not far from Ah Su's place, with the doors locked and "quite a pile" of money, gold and silver, between them, on a bed, which they were counting; that between nine and ten o'clock the same evening they were heard talking together in a low tone of voice in the storeroom already mentioned; that on the next morning a police officer was at Ah Su's place and upon com-

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paring an impression of Pong Chong's foot with a footprint found on the box on which he stood when he was "looking for a rat," the police officer said to him, "Pong Chong you stole that Chinaman's money, where did you put the Chinaman's money you stole? Sure it was you because your footprint is exactly same size as this," to which accusation he made no response, but turned pale; that the police officer then left, and immediately thereafter Pong Chong said to Ah Su, "Don't arrest me and I will settle the matter;" that in a conversation between the defendants at the jail, overheard by two Chinese concealed in an adjoining cell, Chong Duck said, *inter alia*: "Don't be afraid, no matter how good a friend it is don't tell anything about it. I am going to spend \$800 to fight this case out and the remainder \$1000 both of us can go back to China with \$1000;" whereupon Pong Chong said, "I am not afraid, when I go to room to get money nobody see me. This man in store didn't see me there. When the sheriff examine my footprint, after that I kind of little scared;" and that at the time the case was pending in the circuit court, Chong Duck approached the witness, Sam Kaluna, and said, "Sam, I think you better help me. If you help me I will give you fifty dollars, I get clear. * * * If you turn your evidence, testimony, around."

The theory of the Territory seems to be that the defendants having conspired to steal Ah Su's money Pong Chong accordingly entered the room, broke open the trunk, obtained the bag containing the \$1800, opened the window and passed it out to Chong Duck, who was standing at the rear of the room near the window for the purpose of receiving it.

From a careful reading and consideration of the evidence we are of the opinion that, if the jury believed the witnesses for the Territory, and that the jury did so believe must be conceded, the verdict cannot be set aside. We cannot say that the evidence does not sustain the verdict. From the facts

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above recited inferences of the guilt of the defendants could reasonably have been drawn by the jury. The question before us is not whether we would have reached the same conclusion the jury did, but whether the evidence adduced was sufficient to support the verdict.

It must be conceded that the jurors who tried the case, heard the witnesses testify, observed their demeanor, their intelligence, their appearance, their bias or prejudice, if any, and many other *indicia*, were in a better position to determine the truth than we are with only the cold record before us.

2. The defendants during the trial of the case having moved that certain evidence of the witness Sam Kaluna be stricken out, the court said, "The court is always very reluctant to pass upon a matter which is material and matter of fact and which should be passed upon by the jury. It is my opinion that the jury sitting in this case should decide the point which is now presented for decision, and of course they will have an opportunity to consider it later on if this motion is not granted and the evidence remains in. The motion to strike is denied."

The defendants contend that the court erred "in expressing in the presence of the jury, the opinion that the evidence was material." We are clearly of the opinion that the court did not err. It is not only within the exclusive province of the court, but it is the plain and positive duty of the court to pass upon the admissibility of all evidence offered—to say what is material and what is not material. The weight and credibility of the evidence of course is for the jury.

3. The Territory having rested the defendants moved that the evidence of Kahai Mersberg be stricken on the ground that it "is incompetent, irrelevant, immaterial and in no way tends to show the guilt of the defendants." The court, in ruling upon this motion, said: "As a crime may be proven by circumstantial evidence, so every essential element of the crime may

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be proven by circumstantial evidence. And I take it that in this case it might be proven circumstantially that Akaka (Chong Duck) was present, and that it might be proven circumstantially that he aided, incited, countenanced or encouraged Paipu (Pong Chong) to do what he is alleged to have done. The circumstances of this case as shown by the evidence so far given are such, and appearing to have been such I refuse to grant this motion. Motion to strike the evidence of Kahai Mersberg is denied."

The defendants contend that the court in its remarks, as quoted, commented upon the evidence to their prejudice. We do not so view the language of the court.

It is clearly apparent that the court, in its remarks and ruling upon this motion, only had in mind the question which the motion itself presented, namely, was the evidence competent, relevant and material? And, in denying the motion the court, in effect, answered the question thus presented in the affirmative, i. e., the evidence was competent, relevant and material. The court in its ruling did not invade the province of the jury. The evidence was material and having been properly received the court correctly declined to withdraw it from the jury. And the jurors being reasonable men and at least of ordinary intelligence, as we are bound to assume they were, they must have understood and accepted the remarks and ruling of the court in the sense which is so apparent.

The judgment of the circuit court is affirmed.

W. B. Lymer, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief), for the Territory.

Lorin Andrews and Eugene Murphy for defendants.

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TERRITORY OF HAWAII v. LAU CHONG.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 21, 1910.

DECIDED SEPTEMBER 28, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

PRACTICE—*exceptions—instructions.*

A general exception to a series of instructions is insufficient. Instructions are properly refused if substantially given in the court's own language.

OPINION OF THE COURT BY HARTWELL, C.J.

The defendant, who was convicted of an assault with a weapon obviously and imminently dangerous to life, brings exceptions to rulings upon instructions, and upon the same grounds to the verdict and refusal of a new trial.

Before considering the exceptions, separately taken, to the refusal to give certain instructions asked by the defendant we will pass upon the objection which the prosecution raises to the sufficiency of the defendant's general exception to nineteen instructions given by the court of its own motion. The statutory right (Sec. 1863 R. L.) to except to "any" instruction of a judge "in any matter of law" (Sec. 1863 R. L.) does not contemplate a general exception to an entire charge or to a series of instructions or propositions of law, unless it is bad throughout. *Fraga v. Portuguese Mut. Ben. Soc.*, 10 Haw. 128, 129; *Mist v. Kapiolani Est., Ltd.*, 13 Haw. 523, 526; *Territory v. Johnson*, 16 Haw. 743, 757; *Territory v. Hale*, 18 Haw. 665. The law is correctly stated in *Shelp v. U. S.* 81 Fed. 694, 700: "An exception to an entire charge of a court or to a series of propositions contained therein cannot be sustained if any portion thus excepted to is sound." And see *Holder v. U. S.* 150 U. S. 91, 92. Logically, also, an exception to several instructions in gross is not an exception to each of them taken by itself.

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The intention of a general exception may be the same as if specific exceptions were taken to each instruction singly but the practice is open to such grave objections that it cannot be sanctioned.

The defendant abandons exceptions 4, 5, 6, 7, 9, 16, 18 and 19, and relies solely upon his exceptions to the refusal to give instructions 1, 2, 3, 7, 9, 10, 11 12, 13, 15 and 20, as well as his exceptions to the verdict and the denial of his motions to vacate it and order a new trial. The reason given by the court, says the defendant, for refusing to give the instructions he asked, was that "they were covered substantially by the court's charge," which the defendant seeks to show was not done and for this purpose presents in parallel columns certain instructions asked for and given upon certain ingredients of the offense.

The prosecution says that all of the instructions refused by the court and now relied upon by the defendant were "fully covered by the court in its charge," and that "the parallel columns on those pages of counsel's brief in which certain portions of the court's charge are set out, show that counsel for defendant instead of selecting those portions of the court's charge which substantially covered his request, picked out portions relating to other subjects which were, of course, valueless for the purposes of comparison."

The record appears to sustain this contention. For instance, the requested instructions upon intent, although not met by the portion of the charge placed opposite to it, giving the rule that one is presumed to intend the probable and natural results of his acts, is fully covered by other instructions given by the court—one of them at the plaintiff's request—which are cited in the brief for the prosecution. The same is true of the instructions upon the meaning of "malice," "the presumption of innocence," "self-defense" and "burden of proof." It would serve no useful purpose to cite all these instructions which were re-

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fused but were given in the court's own language, as no exception was taken which can be considered, to any which were given. The defendant's contention that "the entire charge is erroneous" and "proceeds upon an apparent incorrect theory" can certainly not apply to those instructions which were given at his request. Confining the defendant's criticism to that portion of the charge which the judge gave of his own motion, the usual instructions upon the presumption of innocence, etc., were given.

Exceptions overruled.

J. W. Cathcart, City and County Attorney, and F. W. Milverton, Deputy City and County Attorney, for the Territory.

E. C. Peters for defendant.

KAUHA (k) AND UPAI (w) v. PALOLO LAND & IMPROVEMENT COMPANY, LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 21, 1910.

DECIDED SEPTEMBER 28, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

LIMITATION OF ACTIONS—*injuries to land.*

Act 113 S. L. 1907, limiting to one year the time for bringing actions for physical injuries to land, repeals Sec. 1971 R. L., as to such limitations of time, by implication.

OPINION OF THE COURT BY DE BOLT, J.

On June 7, 1910, plaintiffs filed their declaration claiming actual damages against defendant in the sum of \$1500 for a trespass *quare clausum fregit*, laid with a continuando.

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The injury complained of is alleged to have occurred on March 12, 1909, more than one year prior to the filing of the declaration, which alleges that defendant, on the date last mentioned, "broke and entered the land of plaintiffs and did then and there injure the close of plaintiffs by depositing and causing to be deposited thereon large quantities of water, rubbish, earth and stones, thereby rendering the land of plaintiffs unsuitable for cultivation and did then and there tear down and cause to be torn trees, crops, shrubs and plants thereon planted and growing, and did break, fill up and utterly destroy and cause to be broken, filled and utterly destroyed, irrigation ditches which have been dug and placed thereon by plaintiffs at great cost and expense to plaintiffs, and did undermine and cause to be undermined plaintiffs' land located within said close."

Defendant interposed a demurrer to the declaration on the ground that the action "is barred by limitation of time by reason and under the provisions of Act 113 of the Session Laws of 1907." The demurrer was sustained and plaintiffs excepted.

Act 113 provides that "Actions for the recovery of compensation for damage or injury to persons or property must be instituted within one year next after the cause of action accrues, and not after." Prior to this enactment the time within which "actions for trespass upon lands" could be commenced was limited to six years next after the cause of action accrued. (Sec. 1971 R. L.)

Act 113 does not purport to repeal Sec. 1971 R. L. We held, however, in *Garcia v. Kekaha Sugar Co.* (ante p. 170), which was an action for personal injuries, that Act 113 applied, and that the action was barred because not brought within one year next after the date on which the injury complained of occurred. The reasons which justified the court in its conclusion in that case are equally applicable in the case now be-

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fore us, namely, that these enactments, as to the time within which such actions must be instituted, cannot be harmonized; that they are inconsistent with and repugnant to each other; that they cannot stand together; and that Act 113, being the last expression of the legislature upon the subject, prevails. Therefore, Sec. 1971 R. L., as to the time within which actions for the recovery of compensation for damage or injury to persons or property must be instituted, is repealed by necessary implication.

Plaintiffs contend, however, that these enactments can stand together as regards the action of trespass *quare clausum fregit*, and that while the later enactment is "inclusive of all cases therein mentioned," it does not include or apply to actions of this character. They argue that Act 113 applies only to cases in which the gist of the action is damage or injury to persons or property, and that it does not apply to an action of trespass *quare clausum fregit*, which is primarily a possessory action, the gist of which is the disturbance of the possession, and that whatever is done after the breaking and entering is but an aggravation of damages. Whatever force, if any, this argument might have in a case involving the sole question of a disturbance of the possession, we need not say at this time. In the case at bar in addition to such damage as may be implied by the mere breaking and entering of the close, the declaration shows an actual and physical injury to the property itself, and plaintiffs emphasize this phase of the case by the facts set forth in the declaration, as well as by claiming substantial damages in the sum of \$1500. The main object of the action is to recover compensation for the physical injury to the land.

Plaintiffs also contend that the declaration shows a continuing trespass. We do not concur in this view. The facts alleged show that the trespass consisted of a single tortious act upon the land, and that the injury is permanent and not continuing in its nature.

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The facts as disclosed by the declaration bring the case within the provisions of Act 113. Therefore, in our opinion, the demurrer was properly sustained.

The exception is overruled.

Kinney, Ballou, Prosser & Anderson for plaintiffs.

Castle & Withington for defendant.

TERRITORY OF HAWAII v. JAMES L. HOLT.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 21, 1910.

DECIDED SEPTEMBER 29, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

GRAND JURY—*additional jurors.*

Of a grand jury panel of twenty-three, three jurors had not been summoned, three had been excused by the court for the term and five others temporarily. Twelve only appearing at a meeting, the court directed the drawing of five additional names from the appropriate jury box to fill the panel. Held, the additional names were validly drawn and an indictment found at a meeting attended by the remaining twelve, the five new members and one of the jurors temporarily excused was valid.

OPINION OF THE COURT BY PERRY, J.

An indictment against the defendant was found by the grand jury on February 16, 1910, and filed in the court on the day following. Subsequently the defendant moved to quash the indictment on the ground, in substance, that the grand jury which found it was illegally constituted. The sole exception before us is to the denial of that motion.

At the time and in the manner provided by law twenty-three grand jurors were drawn to serve during the January, 1910, term of the circuit court of the first circuit. Of these, three

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were not served, one or more of them being without the Territory; prior to January 8 three were by the court excused for the term and one other (J. W. Waldron) until March 1, 1910; an eighth juror (C. G. Bockus) was, also prior to January 8, 1910, by the court "excused temporarily—going to coast—to report upon his return." Bockus returned to the Territory "several days" prior to February 16, leaving again for the mainland on February 18. On the morning of February 16, when the motion below mentioned for additional jurors was made, Bockus had not "reported" to the court, F. T. P. Waterhouse was on the Island of Maui, G. C. Potter was engaged in his usual business at one of the local banks, being, with one E. I. Spalding, who was then serving on the federal grand jury, the only person authorized to sign the paper of the bank, and H. P. R. Glade was likewise serving on the federal grand jury, being a member of the regular panel in that court. These three men, all members of the original panel in the circuit court, had been excused by the foreman of the grand jury, Potter and Waterhouse from attendance at the meeting of that day and Glade apparently for the term. Pursuant to prior adjournment a meeting of the grand jury was attempted to be held on the morning of February 16 but only the twelve remaining jurors appeared. Thereupon a deputy of the city and county attorney moved in court that five additional persons be drawn and summoned to serve with the regular panel, accompanying the motion with the following statement: "If the court please, a meeting of the grand jury was called for 9:30 o'clock this morning. At that hour a sufficient number did not appear to constitute a quorum and cannot be obtained. That arises from the fact that a number of jurors have been excused from the panel as originally drawn, and from the fact that some of the jurors are out of the jurisdiction and others serving on the federal grand jury." The motion was granted and five additional grand jurors drawn and sworn. On the afternoon of the same

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day a meeting of the grand jury was held attended by the twelve above referred to, the five newly sworn members and Bockus. At the meeting the cases of one Freitas, charged with assault and battery, and of this defendant were considered and an indictment found against each.

The argument for the defendant is that the foreman of the grand jury had no power to excuse Potter, Waterhouse or Glade; that Bockus was easily obtainable as a juror and that therefore the drawing of the additional five jurors was unauthorized and void, and the grand jury which found the indictment was without legal authority to do so.

The statutory provision applicable to the case is found in section 1782 of the Revised Laws, as amended by Act 80 of the Laws of 1907, reading as follows: "Whenever a sufficient number of jurors are not drawn or summoned, or whenever a sufficient number of jurors regularly drawn and summoned, as hereinbefore provided, do not appear or cannot be obtained, to form a grand jury, or a trial jury in any case, civil or criminal, the court may order the sheriff to summon additional grand jurors or talesmen as may be required. Three additional grand jurors and three talesmen for trial jurors may be summoned from among the bystanders, if no objection is made by any party interested. If more than three additional grand jurors, or more than three talesmen for trial jurors should be required, or if objection be made to summoning any bystanders, the court shall then, and thereafter as often as occasion may require, direct that from the appropriate jury box may be drawn names sufficient in number to fill said grand jury panel so that the same may then contain not less than 13 or more than 23 grand jurors, or, if the deficiency be in the trial jury, that from the appropriate jury box may be drawn not more than 26 in number for the purpose of filling the panel and acting as trial jurors for the residue of the term; whereupon the court shall direct the sheriff to summon the persons whose names have

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been thus drawn to appear forthwith for the purposes aforesaid." The number of grand jurors in each circuit "shall be not less than thirteen nor more than twenty-three." See Organic Act, Sec. 83, and Rule 4 of the Supreme Court relating to Grand Juries.

It is unnecessary to decide whether the words in Sec. 1782 "a sufficient number" refer to the minimum of thirteen or to a larger number deemed by the trial court essential to a practical working body of grand jurors, for assuming that they refer to the minimum still it is clear that a sufficient number did "not appear" at the morning session of February 16. Twelve only were present. If the word "or" connecting the words "do not appear" with the words "cannot be obtained" is to be read in its ordinary signification, the mere failure of more than twelve to appear was sufficient to justify the court in ordering the additional five to be summoned. The defendant contends, however, that this "or" should be read as "and," the argument being that otherwise the phrase "cannot be obtained" would have no meaning. Passing by the possible objection that under the defendant's construction the words "do not appear" become superfluous and assuming that the construction is correct, still the order was authorized. Not more than twelve jurors could be obtained. It is undisputed that three had not been served and that four had been validly excused by the court. Bockus had not yet reported for duty. The leave of absence which the court had granted him was to extend until he should report and the court by its inaction had acquiesced in his failure to appear, and this it might properly do for it might well have been satisfied that for business or other reasons Bockus should be excused from attendance until the expiration of a few days after his return to the Territory. He was still on a valid leave of absence when the order was made. The court certainly had knowledge of the non-service on the three jurors and of the fact that it had itself excused five. Assuming that it did not know

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of the reasons for the excuse of Waterhouse, Potter and Glade it at least, by its ruling granting the motion, ratified the action, whatever it had been, of the foreman in excusing them. It accepted the statement of the prosecuting officer as correct, and ratifying the excuse, ordered five additional jurors summoned. But there is nothing in the record to show that the court did not know why these three men were not in attendance. It is common procedure in trial courts for the presiding judge to be privately informed in such matters of the course of events and then to have the mere summary of the necessity for the action stated in open court in support of such a motion. The presumption is that the drawing was valid and that the facts existed making it valid and were known to the court, and therefore that the three jurors were excused by the court. "In the absence of any showing on the record upon the subject the court will, when it is necessary to do so, presume that the grand juror was excused." 17 Ency. 1275. See also *Wallis v. State*, 54 Ark. 611 (16 S. W. 821, 822), and *Blevins v. State*, 68 Ala. 92, 94. "Courts do not look with indulgence upon objections to irregularities in selecting or drawing grand jurors committed without fraud or design and which have not resulted in placing upon the panel disqualified jurors." 20 Cyc. 1306-7. There is no contention that any of the five additional jurors was disqualified. It may be added that a juror who has been excused from service, even though temporarily only, "cannot be obtained," within the meaning of Sec. 1782, to aid in forming a grand jury. In this case, even including Waldron, Bockus, Potter, Waterhouse and Glade and the five new members, the maximum of twenty-three was not exceeded.

It is also claimed for the defendant that it is extremely doubtful whether an additional venire can be summoned without first exhausting the remedy of summoning three bystanders, provided no objection is made. It seems to us clear that when, as in this instance, more than three additional grand jurors are

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required the summoning of bystanders is not a prerequisite. Sec. 1782 so provides expressly.

The other questions argued need not be considered.

The exception is overruled.

J. W. Cathcart, City and County Attorney, and F. W. Milverton, Deputy City and County Attorney, for the Territory.

Kinney, Ballou, Prosser & Anderson, and A. S. Humphreys, for defendant.

EDWARD CAMPBELL v. H. HACKFELD & CO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 23, 1910.

DECIDED OCTOBER 4, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

TRIAL—verdict—evidence in support of—plaintiff's habits.

A verdict is not set aside because evidence was rejected or struck out if it afterwards went before the jury.

It was not error to refuse to allow the plaintiff to ask his witness whether he was a drinking man or not at the time of the accident.

TRIAL—instructions—facts for the jury, law for the court—court not required to summarize facts to which instructions are to be applied.

Instructions were properly refused involving a finding by the jury of defendant's liability or a finding by the court that the plaintiff was not negligent.

It is not the duty of the court to refer specifically to facts in the case to which its instructions are intended to apply.

TRIAL—waiver—voluntary submission of personal examination.

The plaintiff waived his exception to an order that he be examined by a physician by voluntarily submitting his person for examination by the physician in presence of the jury.

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OPINION OF THE COURT BY HARTWELL, C.J.

The plaintiff brought an action on the case to recover damages for injuries to his person received in the defendant's employ, resulting from the breaking of a defective rope used in hoisting from the hold of the ship on which he was employed two trucks which had been used in discharging cargo. The details of the case, as shown at the former trial in which a directed verdict was set aside, appear in 20 Haw. 35. A verdict for the defendant was rendered at the second trial and the plaintiff brings exceptions to rulings upon evidence, to granting the defendant's motion that the plaintiff's person be examined by a physician, to certain instructions refused and to others which were given, to the verdict as contrary to law, the evidence and the weight of evidence, and to the refusal of his motion for a new trial based on the same grounds.

The verdict was not unsupported by evidence. On the contrary, there was evidence, and more than a scintilla, in support of it which in conformity with the established practice of this court requires the verdict to stand unless there was prejudicial error in the rulings or instructions or in requiring the plaintiff to submit to a personal examination.

Exceptions were taken to the striking out of certain answers made by witnesses for the plaintiff on the grounds that they were inferences, hearsay, irresponsive to the questions, not appropriate for re-direct examination or immaterial, and to the rejection of certain offers of evidence by the plaintiff on the ground that the offer was not sufficiently specific, failing to state specific facts sought to be shown; but as the evidence struck out or rejected was afterwards presented and went to the jury it is unnecessary to discuss whether the rulings were right or wrong as the plaintiff was not harmed by them. *Territory v. Nobriga*, 16 Haw. 29. This applies to exceptions 1, 2, 3, 4, 5, 8, 9, 10, 11 and 16.

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In exception 6 a witness for the plaintiff when asked "What was the manner in which Tom Pedro showed the rope to the captain?" answered "It seemed to me he was showing the rope to the captain and at the same time it seemed to me in the way he was speaking that the rope was rotten, unfit to use." The answer was struck out as not responsive and as giving the witness' opinion. The witness having testified that he did not remember that he understood "any word spoken between the captain and Tom Pedro," the ruling was correct.

As no reference to exceptions 7, 13, 14 and 15 appears in the brief of either party they are not to be taken as relied upon.

Exception 12 was taken to the refusal to allow the plaintiff to ask one of his witnesses whether at the time of the accident the plaintiff "was a drinking man or not." It is not obvious what bearing the fact that the plaintiff was not a drinking man, if shown, would have had upon the case since at the most it would only have affected the amount of damage to which he would have been entitled if he had received a verdict, and for the further reason that in the absence of evidence to the contrary the presumption was that his habits were good.

The plaintiff requested the following instructions, which were refused:

"If you find that at the time of the falling of the trucks, plaintiff was working in the hold under or near the hatch and that plaintiff had no duty or liability as to selection, oversight, or charge of the ropes used in hauling out the trucks, and that the plaintiff did not hear the call to stand from under, if you find there was such call, then the plaintiff was not guilty of contributory negligence."

"If you find that at the time of the falling of the trucks into the hold, plaintiff was working in the starboard wing of the hold not directly beneath the open hatch, but on the starboard side of the space in the hold directly beneath the hatch, and out from under heavy bodies falling through the hatch, he was not guilty of contributory negligence."

The instructions were properly refused as they involve a

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finding by the jury of the defendant's liability or duty which was a question of law for the court, and a finding by the court that there was no negligence in being where the plaintiff stood at the time of the accident.

The plaintiff excepted to the following instructions, which were given :

"If you find from the evidence that although the defendant may have been guilty of negligence through its servants contributing to produce the injury complained of, still if you find that the plaintiff was also guilty of negligence proximately contributing thereto, the defendant is not liable unless his negligent act occurred after he became aware of the danger to which plaintiff by his own neglect may have exposed himself."

"If you believe from the evidence that the danger to which the plaintiff was exposed was a risk assumed by him, or if such danger was a risk ordinarily incident to his work, or was a danger of which he knew, or by the exercise of ordinary care in the discharge of his duties might have known the plaintiff is entitled to nothing, and your verdict must be for the defendant."

"If you find under the above instructions that plaintiff and defendant were both guilty of negligence which contributed to bring about the accident to plaintiff, then plaintiff cannot recover herein, and you will find for the defendant."

"It is the duty of one engaged in dangerous employment to keep a constant outlook for the dangers that beset him, but if he receives an injury because of a danger to which he is exposed or which he had equal advantages and opportunities with the employer to know and fully understand, he cannot recover for an injury as a result of such danger."

"If you find that the defendant furnished reasonably safe tools, appliances and machinery for the work of discharging the cargo of coal from the bark "Aeolus," and that the defendant was injured on account of the negligence of one or more of his co-workers, then your verdict must be for the defendant."

The plaintiff's objection to the instructions is that they are a "bald statement of the law—without a summary of the facts taken from the case;" were "inapplicable to the weight of evi-

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dence" and might have misled the jury to misapply them and omit to apply them where they were properly applicable, and that they ignore the doctrine of "last clear chance." We do not regard it as the duty of a court to refer specifically to facts in the case to which its instructions are intended to apply if not requested to do so. The instructions state the law correctly. The evidence did not require further recognition of the "last clear chance" than appears in the instructions shown in the bill of exceptions. The entire charge is not brought here and may have further referred to this matter.

Exception 12a was taken to the granting of the defendant's motion for an order requiring the plaintiff to be examined as to his physical condition, alleged in the complaint, "by such physician and surgeon as the court may think proper, at such time and place as the court may appoint." The motion was based upon the affidavit of the defendant's attorney of his information and belief that the plaintiff "was suffering with tuberculosis and that unless he would submit to an examination of his physical condition the affiant would be unable to procure expert testimony as to the extent of the tuberculous condition, its effect upon the plaintiff's earning capacity or his life expectancy because of it," and that the examination was necessary in order that the defendant might intelligently defend the action. The motion was presented and argued before the trial and denied without prejudice to its renewal at a subsequent time during the trial. The plaintiff having rested his case, after testifying in his own behalf and without offering any expert testimony as to his physical condition, the order was made, the plaintiff objecting that it "was a violation of his personal liberty," that "James R. Judd, a physician and surgeon duly authorized to practice and practicing in the Territory of Hawaii, and having no interest in the suit herein be and he is hereby appointed to examine at a time suitable and convenient to the said Judd and to said plaintiff herein, the said plaintiff

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as to his physical condition, the result of said examination, to be established by the oral evidence of said James R. Judd so far as the same is competent, relevant and material, to be used by either party hereto." The doctor was called by the defendant, and after stating in part what he had observed in the examination, said, "If I had the man stripped I could show very much better than I could talk about it just what his condition is." Thereupon the plaintiff's attorney asked the defendant's attorney, "Have you any objection?" the reply being, "I have no objection, let's have it." The plaintiff was then stripped to the waist in the court room and examined by the doctor who showed that the plaintiff had not been injured in the manner or to the extent he had testified for himself. The defendant claims that this was a waiver of the plaintiff's exception.

Undoubtedly the defendant did not intend to waive his exception to the order by offering himself for examination but it may be inferred that he expected to show to the jury that the doctor was not correct in what he would testify concerning him and perhaps could convince the doctor of this, as he afterwards tried to do in cross-examination. If he meant to rely on his exception could he consistently seek in this manner to gain any benefit for himself? Instead of objecting to the doctor testifying or afterwards moving that his testimony be struck out, thereby giving the court an opportunity to reconsider the order, the plaintiff proposed that his person be examined in the presence of the jury. This was inconsistent with relying upon his exception. It was held in *Union Pacific Railway Co. v. Botsford*, 141 U. S. 250, 251, 253, a case like that before us, that the United States Circuit Court had properly denied a motion by the defendant three days before the trial that the plaintiff be required to submit to a surgical examination on the ground that "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all re-

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straint or interference of others, unless by clear and unquestionable authority of law," and that "no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history." In *Camden and Suburban Ry. Co. v. Stetson*, 177 U. S. 172, 174, an action in the U. S. district court for New Jersey to recover damages for injury to the person of the plaintiff caused by the defendant's negligence, a similar motion was denied on the ground that the court had no power to order the plaintiff to subject himself to examination against his will although there was a New Jersey statute authorizing it. The court held that the statute applied in trials at common law in United States courts as Sec. 721 Revised Statutes provided that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply," saying, "There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation if made."

Assuming, but only for the purpose of this case, that under like conditions the rule in the *Botsford* case would be obligatory on this court, we are of the opinion that it does not apply to the circumstances here shown. If the plaintiff was wronged by the order it was because of the unjustifiable invasion of his person which it authorized, but its sole object was to obtain evidence of his physical condition. As the same evidence, to be obtained in the same way, was proposed by the plaintiff, he was not in fact harmed thereby. That an illegal method of obtaining evidence does not make it inadmissible is settled in *Territory v. Soga*, 20 Haw. 71, 82. If wrong had been done to the plaintiff after he had voluntarily subjected himself to examination, it was a wrong in theory only. His offer to be examined was

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intended to make a favorable impression on the jury and if he had succeeded in obtaining a verdict thereby he would have had no cause to complain of the order. It was not the order which was objectionable to the plaintiff when he took the exception, but the examination it required. By requesting examination he showed as plainly as words could do that he no longer objected to it. If the doctor had not examined the plaintiff, or had not been called to testify, the order if illegal would have been harmless. Upon the whole the plaintiff's conduct in this matter appears to have been a practical waiver of any right he may have had to be exempt during the trial from invasion of his person.

Exceptions overruled.

Magoon & Weaver for plaintiff.

A. A. Wilder and C. C. Bitting (Thompson, Clemons & Wilder on the brief) for defendant.

HELEMANO LAND COMPANY, LIMITED, v. C. M. V.
FORSTER, TRUSTEE, AND WAIALUA AGRICULTURAL
COMPANY, LIMITED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 24, 1910.

DECIDED, OCTOBER 5, 1910

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

TENANCY IN COMMON—*lease by one cotenant—other may ratify or repudiate.*

A tenant in common, where a lease has been executed by his cotenant without his knowledge or consent, may ratify the lease and claim his share of the benefits under it, or repudiate it and assert his rights against the lessee. He cannot do both, and having once made his election he is bound.

Helemano Land Co. v. C. M. V. Forster, 20 Haw. 252.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the complainant from a decree sustaining a demurrer to the bill. The demurrer was interposed by the respondent Forster. The Waialua Agricultural Company answered, admitting the facts alleged in the bill, and also stated that it "stands ready and willing to perform and abide by such order and decree herein as the court shall deem meet."

The bill alleges, in substance, that complainant and Forster are tenants in common of certain land; that Forster's predecessor in title leased the land to the Waialua Agricultural Company for a term of fifty years from January 1, 1899, at a certain rental; that the lessee went into possession of the entire land and has since retained the possession; that complainant's predecessor in title, John Emmeluth, brought an action to quiet title to the land against Forster and the Waialua Agricultural Company, in which action Emmeluth was, on September 29, 1909, adjudged the owner of an undivided one-half interest in the land and entitled to the immediate use and possession thereof, and Forster was adjudged the owner of the remaining undivided one-half interest, but the Waialua Agricultural Company was adjudged to be entitled to the immediate use and possession of the undivided one-half interest owned by Forster; that Forster collected all the rent from August 17, 1904, until July 1, 1905; that the Waialua Agricultural Company from July 1, 1905, to July 1, 1909, withheld one-half of the rent, and during the same period paid the other one-half to Forster; and that Forster refuses to pay any portion of the rent to complainant.

The prayer is that complainant's rights be ascertained and declared; that Forster be directed to account for all rents collected; that the Waialua Agricultural Company be directed to account for all rents remaining in its hands, and that it be directed to pay complainant out of the rents hereafter falling due one-half thereof.

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The demurrer alleged various grounds, but the one particularly relied upon was, that complainant had a full, adequate and complete remedy at law, in an action against the Waialua Agricultural Company for mesne profits.

This was a proper ground of demurrer as the facts disclosed by the bill do not present a case for equitable relief.

Forster contends, and we think correctly, that the action to quiet title, brought by Emmeluth, operated as a repudiation of the lease as to the undivided one-half interest in the land now owned by complainant, and that the only remedy now open to complainant is to proceed against the Waialua Agricultural Company in some appropriate action.

We are bound to assume that the judgment obtained by Emmeluth was responsive to the action which he brought, and this being true, the position which he thereby voluntarily assumed, was necessarily inconsistent with any claim he, or his successor in title, might thereafter make under the lease, and being so, it operated as a repudiation of the lease.

A tenant in common, where a lease has been executed by his cotenant without his knowledge or consent, may ratify the lease and claim his share of the benefits under it, or repudiate it and assert his rights against the lessee. He cannot do both, and having once made his election he is bound. 17 Am. & Eng. Ency. Law, 673, 674.

The decree appealed from is affirmed.

W. A. Greenwell (*Castle & Withington* on the brief) for plaintiff.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for C. M. V. Forster.

A. L. Castle filed a brief for Waialua Agricultural Company, but did not appear personally.

In re Holt, 20 Haw. 255.

IN THE MATTER OF THE GRAND JURY DULY IMPANELED AND SWORN IN AND FOR THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

MOTION TO DISMISS WRIT OF ERROR.

ARGUED OCTOBER 17, 1910.

DECIDED OCTOBER 21, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—contempt—order to appear and answer before grand jury.

An order to appear before the grand jury on a day stated and answer a certain question upon the pain of being adjudged guilty of contempt is not reviewable on a writ of error.

OPINION OF THE COURT BY HARTWELL, C.J.

The grand jury for the 1910 term of the first circuit court presented to the first judge an indictment of James L. Holt for embezzlement, which was filed February 17. Upon arraignment, February 21, his plea was reserved for February 26. On March 5, no plea having been taken and the case having been assigned to the third judge, the defendant moved to quash the indictment on the grounds that five who voted for the indictment had been unlawfully summoned as grand jurors and that, as he was informed and believed, there were "but twelve votes cast in favor of finding said indictment." An exception to the denial of the motion was allowed, the question of the legality of the grand jury was brought here upon an interlocutory bill and the exception was overruled. (20 Haw. p. 240.) March 23 the grand jury laid before the judge a report and presentment that while investigating the source from which Holt obtained information concerning their secret deliberations and proceedings and in what manner the proceedings had been divulged, they called Holt who refused, when asked, to say from what source he secured the information, wherefore they requested the court to take action to com-

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pel him to answer their question. He was cited to appear March 26 to show cause why he should not answer or be punished as for a contempt of court for failure to do so. April 1 he moved to quash the presentment and report of the grand jury and to vacate the citation on the grounds that the matter was not cognizable by the grand jury; that it was not an offense for any one to state the information; that there was nothing in the report to warrant holding him in contempt; that the citation was improvidently issued; that under Sec. 83 Organic Act the supreme court of Hawaii had no power to prescribe the form of oaths for grand jurors, and that it did not appear that he had received the information from any member of the grand jury or that any rule of court, statute or law was violated in giving it. The motion having been overruled Holt filed an answer in which he admits that he refused and still refuses to answer the questions, giving as reasons the grounds stated in the motion to quash, with the additional reasons that the answer would compel him to be a witness against himself in a criminal case contrary to the fifth amendment and might tend to incriminate him either in respect of the embezzlement charge or a charge of being principal or accessory to the disclosure of a grand jury secret or both. The judge was of the opinion that the question related to a proper matter of investigation by the grand jury and that to answer it would not tend to incriminate either in respect of the charge of embezzlement or of any charge which might arise out of the investigation, and May 23 made an order that Holt "appear before the grand jury of the first circuit, now impaneled, at its next session, to-wit, on Wednesday, May 25, 1910, at 10 a. m., and then and there answer the question in said report and presentment set forth upon the pain of being adjudged guilty of contempt of this court." On May 23 Holt sued out a writ of error to this order, praying that it be reversed for error. October 6 the Territory applied for leave to file a motion to dismiss the writ on the ground that it does not lie. The

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application was resisted by Holt on the ground of laches, but it appearing that there had been several continuances by agreement and that at one time it was supposed by both sides that the writ might be dismissed by the plaintiff in error, leave was granted to file the motion which has been argued with care.

The Territory contends that as Holt has not disobeyed the order to appear before the grand jury and answer and no adjudication of contempt has been made or would be made if he obeyed the order or if the judge upon reconsidering should vacate it, the writ was premature. In support of the motion decisions are cited that under a statute that a final judgment in a special proceeding is appealable, conditional judgments of contempt requiring further action to become absolute, are not appealable, as for instance, *Brinkley v. Brinkley*, 47 N. Y. 40, 47, and *Semrow v. Semrow*, 26 Minn. 9, 10.

The plaintiff in error seeks to meet this contention by showing that by the law as settled in *In re Anin*, 17 Haw. 337; *In re Mills*, 19 Haw. 88, 94, as well as in *Onomea Sug. Co. v. Austin*, 5 Haw. 604, 607, a final judgment of direct contempt is not appealable. Therefore, as he insists, the order to answer under penalty of being adjudged guilty of contempt is final in its nature and effect, citing *Barthrop v. Kona Coffee Co.* 10 Haw. 398, 400, in which the court said: "It is difficult, perhaps impossible, to define accurately what is or what is not a final decision for the purpose of appeal. A 'final' decision for this purpose is not necessarily in every instance the 'last' decision in a case. The effect of a decision would seem to be a better test of its finality than the stage at which it was rendered." He also relies upon *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 338, under the act of March 3, 1891, 26 Stat. 826, and the act of January 20, 1897, 29 Stat. 492, giving to circuit courts of appeal appellate jurisdiction to review by appeal or writ of error final decisions in all cases arising under the criminal laws. Therefore, as there was no longer ground for refusing to review contempt cases under the common law rule

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previously in force, the court held: "Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the Circuit Court of Appeals. Such review must, according to the settled law of this court, be by writ of error." *Ballmann v. Fagin*, 200 U. S. 186, 192, is also cited, in which a writ of error was issued by the U. S. supreme court to a judge of an U. S. district court committing the plaintiff in error for contempt. It is suggested that possibly the decisions in *In re Anin* and *In re Mills* would have been different if these cases had been brought to the attention of the court.

The Territory replies that as the legislature has authorized appeals from judgments of indirect contempts only, and therefore by implication has declined to modify the common law rule which does not allow appeals from judgment of direct contempt, the court would not be justified in permitting an appeal from an order of this kind, which is taken prior to final adjudication, for the avowed purpose of accomplishing that which the statute does not authorize. When the attorney for the Territory was asked by the court whether an order to pay temporary alimony, which in *Dole v. Gear*, 14 Haw. 554, was held to be appealable, can be distinguished from the order in this case, he answered that it was unlike this order to answer, because the money, if paid, might not be recoverable if the order should finally be held to be unlawful. This is not, however, a distinction in the appealable nature of the orders since pending an appeal from an adjudication of contempt for refusal to answer no harm could result.

We are not prepared to disturb the rulings of this court upon the non-appealability of judgments of direct contempt, for our statute upon the subject, unlike the U. S. Statute, leaves the common law on the subject unmodified.

It may be observed that in *Dole v. Gear*, *supra*, an appeal

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was taken from an order to pay temporary alimony in an equity suit for maintenance, to which the defendant had demurred on the ground that there was no such jurisdiction in equity, which was the preliminary and main question. The next question, namely, whether an order of temporary alimony was necessarily incidental to the exercise of jurisdiction presented no difficulty and also met an affirmative answer. That the order was appealable under the general statute of appeals, being as final an order as could be made on the subject, was obvious, and hence the court said, "The order is the final one for the purpose of appeal under the statute and we cannot make law by creating an exception to the statute." (14 Haw. 567.) It is obvious that there was no non-finality in that order such as there is in the order in this case. To hold this order to be final for the purpose of appeal because an adjudication of contempt, if made, would not be appealable, is to make the existence or non-existence of a further remedy the test of its finality. But the non-final nature of an order is not determined by the fact that if it merges into a final adjudication the latter is not appealable since until the adjudication the order remains subject to be reversed by the judge or complied with by the party, who, until he disobeys it and is held to be in contempt, is not harmed. Moreover, the order, if unlawful, does not deprive him of any remedy which the law may afford or which the legislature has seen fit to grant.

In the cases cited by the plaintiff in error there was a final adjudication of contempt and the question of its non-finality did not arise.

This order does not bear the indicia of finality or terminate the litigation. As above stated, the judge may reverse the order before the time set for compliance or the appellant may comply with it. The grand jury, whether because of the lapse of time or of a change in its personnel or of the recent decision that the five additional grand jurors who attended the meeting at which the indictment was found were lawfully

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drawn, may deem further investigation into the matter or insistence upon an answer unnecessary, and may withdraw the question. In any of these events, no judgment being pronounced against appellant, he would suffer no harm. If, however, both court and grand jury should insist on an answer, and it should be required by this court on appeal and be given, questions might be asked by the grand jury relating to the source and the manner of the disclosure. An appeal from each order requiring an answer would result in an oscillation of the case between the courts. *Prov. Gov't. v. Ah Un*, 9 Haw. 164, 165; *Prov. Gov't. v. Hering*, Ib. 181, 187; *Queen v. Poor*, Ib. 218, 219; *Estate of Banning*, Ib. 357, 358, 359. The mere fact that the order is in violation of constitutional rights of appellant does not render it final and appealable any more than an order to a defendant or other witness claiming similar immunities in the course of an ordinary trial.

To hold that while an adjudication of direct contempt is not appealable, an order to answer or be adjudged in contempt is appealable, would be to open the door to all the objections on which the common law rule is based, such as interference with orders of the court, whether made to uphold its own dignity or to enforce its judgments or decrees, provided they are within the clear discretion of the court, and delaying trials upon every claim of constitutional right. It is far from clear that any question was submitted in the motion to vacate the citation or in the answer which would not have been reviewable in habeas corpus. If, as claimed by the plaintiff in error, the grand jury had no authority to investigate the matter or if his answer would have incriminated him, he would probably have been released on habeas corpus. But however this may be we cannot avoid the conclusion that the motion to dismiss the writ should be granted.

Writ dismissed.

J. W. Cathcart, City and County Attorney, for the motion.
S. M. Ballou contra.

Kawabata v. Okahara, 20 Haw. 261.

H. KAWABATA v. S. OKAHARA.

APPEAL FROM DISTRICT MAGISTRATE OF SOUTH KOHALA.

ARGUED OCTOBER 26, 1910.

DECIDED OCTOBER 26, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

ASSUMPSIT, ACTION OF—*non-service of attachment.*

Assumpsit may be maintained even though a writ of attachment prayed for and issued has not been served.

Id.—*bill of particulars—time for filing.*

A plaintiff should be allowed a reasonable time within which to comply with an order to file a bill of particulars.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit for \$138.25 upon an account stated. Due service was made of the summons, which was in the ordinary form. On the day of the issuance of the summons plaintiff filed a motion for attachment against the property of the defendant accompanying it with an affidavit and a bond. The writ of attachment was issued on the same day but was not served. On the return day the defendant moved to dismiss the action on the ground of lack of service of the writ of attachment and of plaintiff's failure to file a bill of particulars with his declaration. The magistrate "dismissed the case."

The fact of non-service of the writ of attachment did not preclude the plaintiff from maintaining his action as in an ordinary case in which no attachment is asked, and if the magistrate was of the opinion that a bill of particulars should be required the proper course was to permit the plaintiff a reasonable time within which to file it. Under the circumstances, the action should not have been dismissed.

The appeal is sustained and the cause remanded to the district magistrate for further proceedings not inconsistent with this opinion.

M. T. Furtado for plaintiff.

W. C. Achi for defendant.

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WILLIAM O. SMITH, SAMUEL M. DAMON, E. FAXON BISHOP, ALBERT F. JUDD AND ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE PAUAHI BISHOP, DECEASED, v. ALEXANDER LINDSAY, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 7, 1910.

DECIDED NOVEMBER 10, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

JUDGES—*disqualification of*—*Sec. 84, Organic Act.*

By the terms of Section 84 of the Organic Act a judge who is related by affinity within the specified degree to a person who is suing as trustee under a will is disqualified from sitting in the case.

OPINION OF THE COURT BY PERRY, J.

The chief justice has called the attention of counsel to the fact that he is the brother-in-law of one and the father-in-law of two of the persons who are trustees under the will of Bernice Pauahi Bishop, deceased, and as such are named as parties plaintiff in this case and has suggested the question of his possible disqualification, saying that he supposed that he was disqualified. The attorneys on both sides also take the view that the disqualification exists.

Section 84 of the Organic Act provides that "no person shall sit as a judge * * * in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge * * * may have, either directly or through such relative, any pecuniary interest." The language of the section is sufficiently clear. When no relationship exists between the judge and any of the parties, a *pecuniary* interest in the issue of the suit is essential to disqualification, but when the

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specified relationship does exist, the mere fact that the judge's relative is a party constitutes a disqualification. The words "either as a plaintiff or defendant" would seem to have been inserted to define the nature of the relative's interest which should be sufficient to disqualify. In their absence the reader would have been left in doubt as to whether, not to mention other possibilities, the interest which congress had in mind was pecuniary or that of a mere member of the community or that of one standing in the condition of a party. The phrase quoted removes that doubt. In *Ewa Plantation Co. v. Tax Assessor*, 18 Haw. 509, 510, the court said, although perhaps the remarks were obiter dicta: "A judge's pecuniary interest in the case, or the mere fact that a relative within the stated degree is a party, whether the judge has any pecuniary interest in the matter or not, disqualifies him from sitting. * * *

It may be that when a relative is a party his interest is merely nominal or that he has no pecuniary interest in the issue of the case, but none the less the judge is disqualified from sitting in such case."

Whether a nominal party is a party within the meaning of the section is a question which does not arise in this case. Messrs. Smith, Judd and Carter are active litigants. With their co-trustees they instituted this suit, have control of it, may, subject to the ordinary rules of procedure, maintain it or discontinue it at their pleasure and have all the rights of appeal allowed by law and all the other powers ordinarily possessed by parties. It may be added that it is immaterial for the purposes of the question here involved whether litigants who are relatives of the judge are suing in their own right or in a representative capacity. Upon this latter point the authorities are not in entire accord, but see, for example, *State v. Foster*, 36 So. (La.) 554, 555, 556, and *Dennard v. Jordan*, 37 S. W. (Tex.) 876.

In our opinion the chief justice is disqualified in this case.

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B. L. Marx (Kinney, Ballou, Prosser & Anderson on the brief) for plaintiffs.

Defendant in person, *W. L. Stanley* also for him (*Holmes, Stanley & Olson* on the brief).

L. L. McCANDLESS v. MARSTON CAMPBELL, SUPER-
INTENDENT OF PUBLIC WORKS OF THE TER-
RITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 1, 1910.

DECIDED NOVEMBER 17, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

MANDAMUS—*agreement to pay sewer rates.*

It is within the statutory powers of the superintendent of public works to require an applicant for sewer connections to agree to "pay such rates annually for the use of the sewer as may be fixed."

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal by the plaintiff from a judgment dismissing his petition for a writ of mandamus to compel the superintendent of public works to grant his application to connect his premises on Nuuanu avenue with the sewer in Pauahi street in Honolulu, although in connection with the agreements on his part contained in the printed form of application, and to none of which he objects, he has erased the words "to pay such rates annually for the use of the sewer as may be fixed," his claim being that the statute does not authorize the requiring of such an agreement, and that its effect would be to give the superintendent arbitrary power in fixing sewer rates. This is the only objection to the form of the application which is presented for our consideration, and it appears from the pleadings that in other respects the form was entirely satisfactory

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to the plaintiff. The petition was dismissed upon the granting of the defendant's motion to quash the alternative writ of mandamus.

We think that the limits of sewer rates are sufficiently defined by the statute, namely, that they "shall be fixed from time to time by the superintendent, subject to the approval of the governor, and shall be reasonably approximate to the cost of work done and material used," and "shall be fixed as nearly as reasonably may be, so that the entire yearly rates for sewer use shall not exceed the total yearly cost of maintaining and repairing the sewers, together with the yearly interest on the bonds representing the cost of the sewer system." Sec. 1036 R. L. The variable factors in the problem of rate fixing are the cost of connecting premises with the public sewer and of maintenance and repair of the sewers, individual assessments depending upon the number of users of the service and upon the amount of outstanding sewer bonds. It is obvious that these rates, depending upon these variable conditions, although determinable from year to year with approximate accuracy, cannot be fixed with any degree of permanence. Regarding the form of agreement as not open to the objection that it would authorize rates to be assessed arbitrarily, we think that requiring the agreement to be entered into is within the superintendent's statutory duty to superintend the connecting of premises with the public sewer (Sec. 1035 R. L.), regulate the rates of charges for sewer use, subject to the governor's approval (Sec. 1036 R. L.), and to require the payment of the "charge for sewerage semi-annually in advance," the charges for sewer connections being payable to the superintendent on demand, to secure which payment he "may require a deposit in advance." (Sec. 1037 R. L.)

Judgment affirmed.

W. S. Edings for plaintiff.

E. W. Sutton, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief), for defendant.

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CONCURRING OPINION OF PERRY, J.

The sole contention in support of the appeal is that the requirement of the inclusion in the application of the agreement to pay rates is not within the powers of the superintendent of public works and is unauthorized by law.

The following statutes relate to the general subject of sewers: "It shall be the duty of the Superintendent of Public Works, conforming to the requirements of the Board of Health, to direct and superintend the cleaning of the public streets and by-ways of any city, town or village in the Territory of Hawaii, the removal and disposal of garbage, dead animals and other nuisances therein, the cleaning of cesspools and connecting of premises with the public sewer in such city, town or village."—Sec. 1035 R. L., as amended by the Laws of 1905. "The rates of charges for such services and for use of the sewer shall be fixed from time to time by the superintendent, subject to the approval of the governor."—Sec. 1036 R. L. "The rates and charges in this chapter provided, for the collection of garbage, shall be payable to the superintendent quarterly, in advance, and the charge for sewerage semi-annually, in advance. Charges for cesspools, sewer connections and removal of animals and other nuisances, shall be payable on demand; and to secure such payment, the superintendent of public works may require a deposit in advance."—Sec. 1037 R. L. Section 1038 provides that the sewer rates shall be a lien upon the property connected, to attach "as of the date when said sewer rate or charge is due and payable to said superintendent of public works, as in this chapter provided." "District Magistrates shall have jurisdiction to hear and determine all civil actions, suits or proceedings brought by the Superintendent of Public Works for the collection and enforcement of collection and payment of all sewer rates or charges which may be assessed, as above set forth, notwithstanding the amount claimed.—Sec. 1039 R. L., as amended by Act 21 of the Laws

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of 1905. Neither the constitutionality of any of these sections nor the validity of the rates fixed by the superintendent of public works is questioned in this case. The presumption must therefore be that the statutes are constitutional and the rates valid. The language of these sections shows clearly that it was the intention of the legislature to authorize the superintendent of public works not only to prescribe the rates to be charged for the use of the sewers but also to collect those rates, by suit if necessary. In my opinion this authorization also includes the implied power to make all reasonable rules and regulations not only concerning the making of connections with the sewers but also to facilitate the collection of the rates. A requirement from an applicant of an express agreement in writing to pay the rates, and thus facilitate their collection, is within those powers. The agreement under consideration in this case cannot be construed as an undertaking to pay rates arbitrarily assessed but merely as a promise to pay such rates as may be fixed in accordance with law. It is not unreasonable to ask an applicant who desires to connect his premises with the public sewer and who presumably intends to pay for its use as required by law to reduce his agreement to writing.

For these reasons I concur in the conclusion that the judgment be affirmed.

TERRITORY OF HAWAII, BY MARSTON CAMPBELL,
SUPERINTENDENT OF PUBLIC WORKS, *v.* TUE
BUN.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 4, 1910.

DECIDED NOVEMBER 17, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

CONTRACTS—*duress*—*sewer rates*.

The defendant's agreement "to pay such rates annually for the use of the sewer as may be fixed," made with the superintendent

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of public works in order to obtain permission to connect premises with the public sewer, is enforceable under the decision in *Territory v. Brown*, 19 Haw. 41, for rates fixed prior to the act of 1904 (Sec. 1036 R. L.), and is not made under duress by reason of a statement to the defendant by an inspector of the board of health that the defendant would be prosecuted for nuisance if he did not connect with the sewer.

CONTRACTS—*defense of illegality not available.*

The defendant having obtained permission to connect his premises with the public sewer upon his promise to pay the rates and having paid them for a year and a half without protest and stopped payment without any claim that the rates were illegal and having continued the use of the sewer for his premises, is not in a position to assert the illegality of the rates or the unconstitutionality of the act under which they were fixed.

OPINION OF THE COURT BY HARTWELL, C.J.

This was an action brought in the district court of Honolulu May 14, 1909, to recover \$117 "for unpaid sewer rates from January 1, 1903, to June 30, 1909, for use of plaintiff's sewer during said time in Maunakea street in said Honolulu in connection with the premises owned and occupied by defendant, at the semi-annual rate of \$9, and which said rate defendant promised and agreed to pay," the plaintiff claiming that there was due from defendant "by reason thereof said sum of \$117 together with ten per cent. penalty thereon fixed by law." The defendant appealed to the circuit court from the judgment in the sum of \$126 and costs, and the parties waiving jury the defendant presented the defenses of duress, failure of consideration and the statute of limitations, claiming that his agreement with the superintendent of public works of June 3, 1901, "to pay such rates annually for the use of the sewer as may be fixed," was not voluntarily made, but was forced upon him by the necessity of obtaining permission to connect his premises with the public sewer in order to avoid the penalty imposed by regulation of the board of health if he should not discontinue use of privy vaults and cesspools and transform the same into approved waterclosets

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connected with the sewer system. The defendant contends that rates fixed by the superintendent prior to the act of April 1904 (Sec. 1036 R. L.) were without legislative sanction and that those fixed under the act were illegal on the grounds that the act was a delegation of legislative power, that the rates were in the nature of a special tax or assessment made without opportunity for him to be heard concerning them, and also because interest on sewer bonds and expense of maintenance and repair of the sewer, on the basis of which taxes were fixed under the act, were provided for by general appropriations to which the defendant's general taxes had contributed.

It appeared by the defendant's evidence that in June, 1901, he had built and plumbed a lodging house on Maunakea street in Honolulu and wished to make a cesspool for the premises, but upon being told by an inspector of the board of health that if he did this he would be prosecuted for nuisance and that he must connect with the sewer, he signed the application to the superintendent of public works, given to him by the plumbers, in the form referred to in *Territory v. Brown*, 19 Haw. 41, for permission to connect with the public sewer, agreeing therein "to pay such rates annually for the use of the sewer as shall be fixed." His premises were then connected with the sewer and until December 31, 1902, he paid the rates which were fixed at \$9 semi-annually, and then stopped paying because, as he now says, he wanted to have his own cesspool and was not satisfied with the sewer.

There is no evidence that the defendant made the agreement for payment of sewer rates from fear of being held liable for the penalty under the regulation of the board of health, for his application for permission to connect his premises with the sewer was made upon his being told by the health officer that otherwise he would be prosecuted for nuisance. It was true that cesspool drainage in that locality might have been a nuisance and hence the defendant acted wisely, and not under illegal coercion, in avoiding the risk.

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Under the decision in *Territory v. Brown*, 19 Haw. 41, which case is not before us for consideration de novo, the agreement was enforceable for rates fixed prior to the act of 1904.

If the act was unconstitutional on any of the grounds asserted by the defendant, then the rates fixed thereunder could not lawfully be required of the defendant if he is in a position to assert such illegality and enforce a claim to be exempt from paying them by reason thereof.

The consideration of the agreement was the permission to connect with the sewer. The defendant claims that he was entitled to use the sewer without payment as its construction and maintenance had been provided for by territorial appropriations to which his general taxes had contributed. But even if this were true the fact remains that he received the benefit of the permission to connect with the sewer without asserting the claim that he was entitled to do this without permission, and the consideration, which is not illegal or unlawful, of this benefit received by him remains. His payment of rates without protest for a year and a half, stopping payment for no other avowed reason than because he preferred cesspool drainage, and his continued use of the sewer do not leave him in a position at this late day to dispute the legality of the rates fixed under the statute of 1904 or the validity of the statute under which they were fixed, his premises having meanwhile received the benefit of sewer drainage and he having avoided the risk of prosecution for a nuisance if he had made a cesspool and undertaken to dispense with the sewer.

It is not every one who can interpose constitutional objections to a statute. The rule *volenti non fit injuria* is sometimes applied in such cases, being another way of stating the position of one whose acquiescence in the operation of a statute precludes him from afterwards excusing non-performance of acts required by it on the ground of its unconstitutionality.

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The acquiescence in this case may be inferred from the defendant's conduct. If he had seasonably made the objections which he now makes to the legality of the rates or to the constitutionality of the act his objections might have received consideration from the superintendent who would then have had an opportunity to be advised whether the objections were well taken, and in that event he might have applied to the legislature for an amendment of the law, or if funds were not otherwise available for the sewer he might have applied to the governor for resort to the appropriation of \$50,000 made for contingent purposes; the latter alternative, however, is not concurred in by the minority.

The following cases illustrate the rule. The constitutionality of a law requiring the bond of an officer to be a lien on the real estate of an officer and his sureties cannot be attacked by persons voluntarily executing the bond. "The doctrine of due process of law certainly cannot be invoked by those who have voluntarily executed the bond." *Mt. Vernon v. Kenlon*, 89 N. Y. Suppl. 817. One who had been deprived by an unconstitutional statute of a right to have damages assessed for the taking of his land was held to have waived his right to insist upon the unconstitutionality by having agreed that "if the property should be abandoned by the respondent for his benefit his damages would be very small, if any, and that one thousand dollars would be a reasonable sum for him under the agreement." *Hellen v. City of Medford*, 188 Mass. 42. A taxpayer whose land was sold for nonpayment of taxes was held to be "not in a position to raise the question of the constitutionality of the acts" under which his property was sold, for "a person may by his own acts or by his omission to act waive a right which he might otherwise have under the provisions of the constitution." *Bacon v. Rice*, 14 Idaho, 107, 118. The defendant, imprisoned under a city ordinance for selling adulterated milk, had furnished samples of the milk without objecting to the constitutionality of the ordinance re-

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quiring this to be done and was held to have acquiesced in it. "He cannot be heard to question the regularity or the legality of the execution of the ordinance, to the execution of which he consented." *State v. Stone*, 46 La. Annual, 148. Defendants, who built a dam under a statute requiring their payment of damages, were held not to be at liberty to question the constitutionality of the provision for assessing the damages. *People v. Murray*, 5 Hill, 468. In an action to foreclose a lien on a street assessment for work done on the defendant's lots it was held that the appellants, by failure to object to the proposed work at the time named in the published notice, "cannot now be heard to make the objection which they should have made before the work commenced and in the manner prescribed in the statute," the objection including the claim that the assessment was in conflict with the fourteenth amendment. *O'Dea v. Mitchell*, 144 Cal. 374. See also *Vose v. Cockroft*, 44 N. Y. 415.

"A person may by his acts or omission to act waive a right which he might otherwise have under the constitution of the United States as well as under a statute." *Pierce v. Somerset Ry.*, 171 U. S. 641, 648. "An insolvent debtor who proves his debt in insolvency and accepts the benefit of proceedings under a state statute thereby waives any right which he might otherwise have had to object to the validity of the statute as impairing the obligation of contracts." *Eustis v. Bolles*, 150 U. S. 361. See especially *Shepard v. Barron*, 194 U. S. 553, 567.

The plaintiff in argument says he claims for rates payable at the end of each semi-annual period from January 1, 1903, to June 30, 1904, and thereafter semi-annually in advance, thereby avoiding the question whether the statute of limitations runs against the Territory.

The circuit judge is advised that the defenses above named are not sustainable on the evidence offered and that the defendant's motion for judgment should be denied.

E. W. Sutton, Deputy Attorney General (Alexander Lind-

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say, Jr., Attorney General, with him on the brief), for plaintiff.

P. L. Weaver (*Magoon & Weaver* on the brief) for defendant.

NO. 10. TERRITORY OF HAWAII, BY MARSTON CAMPBELL, SUPERINTENDENT OF PUBLIC WORKS, *v.* TUE BUN. Reserved Questions from Circuit Court, First Circuit. Oral motion to amend decision. Argued November 22, 1910. Decided November 23, 1910, Hartwell, C.J., Perry and De Bolt, JJ. Per curiam: The decision, as filed, is that the circuit judge "is advised that the defendant's motion for judgment should be denied and judgment given for plaintiff as prayed." The motion is that the direction that judgment be given for plaintiff as prayed be stricken out, defendant stating in favor of the motion that it is his desire to present in the lower court the further defenses (1) that the case of *Territory v. Brown*, 19 Haw. 41, should be overruled, (2) that no recovery can be had for the rates for the period subsequent to the date of the commencement of this action, and (3) that the statute of 1904 is unconstitutional in providing for penalties for delinquent rates. The question relating to the penalties was argued at the hearing upon the reserved questions and was considered by the court. The estoppel found to exist concerning the setting up of the unconstitutionality of the statute of 1904 applies with reference to the so-called "penalties" as well as to the ordinary rates. The "penalties" are simply additional charges prescribed to be paid in the event that the ordinary rates are not paid within the time stated. Such additional charges are a part of the sums agreed to be paid by the defendant in the contract sued on. The statement of questions reserved was apparently prepared on the theory that the parties had presented all of their claims and defenses in the lower court and that the decision of this

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court should determine finally the issues between them. Question three asks, "Should defendant's motion for judgment be granted, or should judgment be given for plaintiff as prayed?" The decision, clearly responsive to this question, answers the first alternative in the negative and the second in the affirmative.

E. W. Sutton, Deputy Attorney General, for the Territory.
Magoon & Weaver for defendant.

EMILIE L. D'HERBLAY *v.* CHARLES G. MACOMBER.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 21, 1910.

DECIDED NOVEMBER 29, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

CREDITOR'S SUIT—bill to set aside deed.

D. filed her bill in equity, alleging that N. had executed to her two promissory notes; that N. conveyed his property to M. with the purpose to defraud her; that N. having died without any property subject to execution, she prayed that the deed be set aside, the property sold, and the proceeds applied to the payment of her notes.

Held, on demurrer by M. that a court of equity is without jurisdiction to recognize the promissory notes as a valid claim against the estate of N.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal from an order sustaining the defendant's demurrer to a bill filed by the plaintiff, alleging in substance, that on September 23, 1892, Samuel Norris executed to the plaintiff two promissory notes payable "after" the death of Norris, on which notes, including interest, there is now due and unpaid the sum of \$66,240; that on June 25, 1910, without consideration and with the purpose to defraud the plaintiff, Norris executed to the defendant a deed for certain property

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on the Island of Hawaii, known as the Kahuku ranch, containing an area of about 185,000 acres, together with personal property thereon; that Norris died on July 14, 1910; that at and from the time of the execution of the deed to the time of his death, Norris had no other property subject to execution; that the plaintiff is without a remedy at law, and that, unless the defendant be restrained, he may commit waste or dispose of the property, and thus the plaintiff might suffer irreparable injury.

The bill prays that the deed be adjudged fraudulent and void; that a temporary injunction issue restraining the defendant from committing waste and from disposing of or encumbering the property; that a decree issue declaring the plaintiff entitled to payment of the notes out of the proceeds of the property; that a receiver be appointed with the usual powers and duties; that the property be sold and the proceeds, or so much thereof as may be necessary, applied in payment of the plaintiff's claim, and for other relief.

The crucial question in this case, as presented by the defendant's demurrer, is this: Has a court of equity jurisdiction to recognize a promissory note as a valid claim against the estate of a decedent and power to subject property, fraudulently conveyed by the deceased grantor, to the satisfaction of such claim? In our opinion, both upon reason and authority, this question must be answered in the negative.

The plaintiff's chief contention, based upon the *Lopez* case, 19 Haw. 620, 624, namely, that a creditor's bill against the grantee of a fraudulent conveyance is not demurrable on the ground that the plaintiff has not obtained judgment against the administrator and taken out execution on which *nulla bona* has been returned, may be conceded for the purposes of this case. But this does not obviate the necessity of having the validity of the claim either conceded or otherwise established in some manner recognized by law; for it is indispensable to the maintenance of a creditor's bill against the grantee

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of a fraudulent conveyance by a deceased grantor, that the plaintiff shall have first established the fact that he is a creditor of the decedent's estate, and that his claim is valid and genuine. These prerequisites are essentially of common law jurisdiction as distinguished from equity. For aught that appears, the estate of the decedent may have a good defense to the notes if they should be presented to the administrator. (*Houston v. Maddux*, 179 Ill. 377, 389.) Why should the defendant be required to assume the burden of a defense which in no way concerns him?

In *Estes v. Wilcox*, 67 N. Y. 264, 266, the court said:

"In a suit against the personal representatives of the debtor to recover it (the claim), any defence which the debtor himself could have made, could be interposed, and the claims would be subject to set-off, or to the plea of the statute of limitations, or to any defence existing when the action was brought. These questions would be settled as between the creditor and the estate by a judgment in the creditor's action against the representatives. It is convenient and reasonable to require this to be done before subjecting third persons to litigation with the plaintiff, who may never be able to establish any claim against the estate."

Moreover, to permit a court of equity to assume jurisdiction in this matter and pass upon the genuineness of these notes would be an invasion of the constitutional right of a trial by jury. (*Putney v. Whitmire*, 66 Fed. 385, 388.)

The plaintiff has not had her claim allowed by the administrator, nor has she otherwise established the fact that she is a creditor of the estate; consequently she has no standing in a court of equity.

Touching upon the various phases of the question before us, as well as upon creditors' bills in general, we cite the following authorities: *Haston v. Castner*, 31 N. J. Eq. 697; *M, M. T. Co. v. Borland*, 53 Id. 282; *Rutherford v. Alyea*, 54 Id. 411; *Scripps v. King*, 103 Ill. 469; *National Bank v. Kinard*, 5 S. E. 464; *Compton v. Patterson*, Id. 470; 3 Pomroy's Eq.

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Jur. (2d ed.) Sec. 1415; 1 High on Injunctions, Sec. 326; *O'Connor v. Boylan*, 49 Mich. 209.

We cannot accept the plaintiff's view that the legal relief sought, namely, the establishment of the claim on the notes, is incidental to the prayer to set aside the deed. To the plaintiff, as is natural, payment of the notes is the chief purpose of the suit—all other matters involved are merely incidental to that end. (16 Cyc. 114.)

The plaintiff further contends that should she present her claim to the administrator for allowance she would be estopped from contending for payment out of the real property of the deceased, citing *Ching Tam Shee v. Oriental Life Ins. Co.*, 19 Haw. 663. A similar question of estoppel was discussed in *Castle Estate v. Haneberg*, ante 123, 127. The *Ching Tam Shee* case is clearly distinguishable from the case at bar. In that case the claimant, a judgment creditor, was held estopped from levying execution on the ground that having obtained the allowance of its claim the executrix would properly have inferred therefrom that the claimant did not intend to enforce payment by an execution sale of the land and did intend that the claim should take its regular course of administration with other claims. Should the plaintiff present her claim to the administrator she would then be pursuing the regular course prescribed by the statute, and in the event of a deficiency of assets in the hands of the administrator with which to pay her claim, there is no reason why she could not then reach property fraudulently conveyed by the deceased and have the proceeds applied on her claim. The case at bar is further distinguishable from the *Ching Tam Shee* case on the ground that in that case there was no claim that any property had been fraudulently conveyed.

Counsel for the plaintiff placed considerable reliance on *Case v. Beauregard*, 101 U. S. 688. The case had been before the court in 99 U. S. 119. In the later decision it was held that the first decision was *res judicata*. As we view the case it

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is authority for the defendant rather than for the plaintiff.

The case viewed from its inception supports the doctrine that in the absence of an established claim, lien or trust, a court of equity in a case like the one at bar has no jurisdiction.

The order appealed from is affirmed.

Magoon & Weaver for plaintiff.

S. M. Ballou and *A. S. Humphreys* (*C. W. Ashford, A. S. Humphreys, and Kinney, Ballou, Prosser & Anderson* on the brief) for defendant.

IN THE MATTER OF THE BOUNDARY OF SECTIONS TWO AND THREE OF KAHUA 2 IN THE DISTRICT OF SOUTH HILO, ISLAND OF HAWAII.

APPEAL FROM COMMISSIONER OF BOUNDARIES, FOURTH CIRCUIT.

ARGUED NOVEMBER 14, 15, 16, 17, 1910.

DECIDED DECEMBER 2, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*right of appeal from decision of boundary commissioner.*

At the hearing of a petition for the determination of the boundaries of certain land the Territory of Hawaii appeared and contested the boundaries as claimed by the petitioner. The issue of fact was tried at length, the parties producing, at considerable expense, all of the evidence known to them. Nearly four years later the commissioner filed his decision dismissing the petition "without prejudice, at the petitioner's costs," on the ground of failure of proof of petitioner's title to the land the boundaries of which were sought to be adjudicated. Held, that the Territory was aggrieved and had the right of appeal from the decision.

DISMISSAL AND NON-SUIT—*proof of title in boundary case.*

In the petition, the applicant alleged title in itself. This allegation was not disputed and the trial was conducted on the theory that the applicant had title. Under these circumstances

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the commissioner may not, of his own accord and without giving opportunity to the parties to cure the supposed defect, dismiss the petition on the ground of failure of proof of title.

APPEAL AND ERROR—boundaries—newly discovered evidence.

In the supreme court, on appeal from a boundary commissioner, additional evidence may be admitted even though strictly not "newly discovered" within the meaning of the law applicable to motions for new trials in ordinary cases.

BOUNDARIES—finding on the evidence.

Upon the evidence in this case the westerly or mauka boundary of the ahupuaa of Kahua 2 in the district of South Hilo, Hawaii, is held to be at a point called Kananaka and not at a point called Huinawai or Nahuina.

OPINION OF THE COURT BY PERRY, J.

This is an appeal from a decision of the commissioner of boundaries for the fourth judicial circuit upon the petition of the Pepeekeo Sugar Co., a corporation, filed on April 23, 1906, for the determination of the boundaries of two certain tracts of land situate in the district of South Hilo on the Island of Hawaii and hereinafter more particularly referred to. The Territory appeared as a party claiming land adjoining one of these tracts and disputing the correctness of the boundaries as described in the petition. One Emily P. Kinney also appeared claiming land adjoining the other of these tracts and similarly disputing the correctness of the boundaries in so far as they affected her interests. The decision, filed on June 2, 1910, was that "The petition is dismissed, without prejudice, at the petitioner's costs." The commissioner, after stating that "the evidence in this case is insufficient to warrant the commissioner in adjudging the boundaries * * * to be as alleged by the petitioner, by the Territory or by Emily P. Kinney," and that "a preponderance of the evidence shows that the ahupuaa of Kahua, awarded in 1852 to Kahonu, extended in a westerly direction to Huinawai, as alleged by the petitioner," declared that he would "not adjudge the boundary to be as claimed in the application," or at all, "for the reason that petitioner's interest therein is not disclosed by the evidence, no

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title having been proved, by the introduction of title deeds or otherwise, to any portion of the said konohiki land. The omission is fatal, for the right to apply for certification of boundaries is conferred, by Section 353 of the Revised Laws, only upon owners of the land, and proof of such ownership is indispensable." The Territory appealed. The petitioner now contends that under the circumstances the Territory has no right to appeal.

Sec. 355, R. L., provides that "any party deeming himself aggrieved by the decision of the commissioner" of boundaries "may appeal therefrom to the supreme court." The issue joined between the Territory and the applicant was tried at length. Much evidence was adduced by each party, and the Territory, as well as, undoubtedly, the petitioner, incurred considerable expense in preparing for the trial and in presenting the evidence. The bill of costs as taxed was in the sum of \$516.10. Nearly four years elapsed between the submission of the cause and the filing of the decision. Kamaaina testimony is each year becoming more difficult to obtain in cases of this nature. Witnesses may well have passed away since the trial. Assuming that a transcript of the testimony taken at the trial would be admissible on the trial of a new proceeding between the parties after the death of the witnesses who testified, still the testimony given by living witnesses is ordinarily of greater value and weight than a written statement of their testimony. The petitioner was at the time of the trial and ever since has been in possession of the piece of land now in controversy. The Territory is interested financially in having an adjudication of the boundaries and clearly may deem itself "aggrieved" by the decision of the commissioner and under the statute has the right of appeal therefrom.

The appellee makes no claim that the dismissal of the petition can be supported on the ground, advanced by the commissioner, that there was no evidence of the title of the petitioner to any part of Kahua 2. Under the circumstances of

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this case the ruling cannot stand. Assuming that only those holding the title can be petitioners in such cases the Pepeekeo Sugar Co. alleged ownership in itself and that allegation was evidently accepted as true by the Territory and Emily P. Kinney, the only other parties who appeared in the proceedings. No question as to the title was at any time raised by them and the trial was conducted on the theory that the Pepeekeo Sugar Co. was the owner as alleged. Had the Territory or Emily P. Kinney sought on appeal for the first time to have the petition dismissed on that ground they would have been held not to be in a position to present the claim and certainly the commissioner, who is directed by the statute (R. L., Sec. 354,) to "endeavor * * * to obtain all information possible to enable him to arrive at a just decision as to the boundaries," cannot properly, of his own accord and without giving the parties an opportunity to cure the alleged defect of formal proof, dismiss the petition on that ground.

Before entering into the main argument in this court the Territory presented two motions, one for the introduction in evidence of an original map, a copy of which had already been introduced by the applicant, and the other for the taking of a deposition intended to explain the circumstances under which a notation had been made by the witness on a certain other map also introduced at the trial by the applicant. We ruled that even though the proposed evidence was not strictly "newly discovered" within the meaning of the law applicable to motions for new trials in ordinary cases, civil and criminal, it was, nevertheless, admissible under the informal and liberal procedure contemplated by the statute and customary in such cases. The evidence, when admitted, proved to be of but little, if any, consequence.

The petition is that "In the matter of the boundaries of the ahupuaa of Kahua 2nd, L. C. A. 5663 to Kahonu, situate in the district of Hilo, Island of Hawaii," the boundaries "of the remaining portions of this aforesaid land of Kahua 2nd as yet

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uncertificated" be adjudicated. L. C. A. 5663 to Kahonu (Apana 2) simply awards "kona Ahupuaa o Kahua ma Hilo, ma ka Mokupuni o Hawaii" ("his ahupuaa of Kahua in Hilo, in the Island of Hawaii"). What was the "ahupuaa of Kahua" named in the award?

In the district of South Hilo, Hawaii, between the Makea stream on the north and the Wahalea or Aliia stream on the south and extending from the sea on the east to a line on the west terminating at the point called Huinawai or Nahuina lies a long narrow strip of land generally known as "Kahua." Of this tract a portion containing an area of 135 acres was on January 17, 1850, sold by the government to John Ely for the consideration of \$101.25 and granted by R. P. 194. In this patent, which contains a description by metes and bounds, the granted land is described as being "i kela apana aina a pau e waiho la ma Kahua Akau Hilo ma ka Mokupuni o Hawaii" ("all that piece of land situate at Kahua Akau Hilo in the Island of Hawaii"), and its southern boundary as adjoining, in part at least, "Kahua waena" ("middle Kahua"). Another portion was on July 11, 1853, granted to John Pelham by R. P. 1158, the consideration for the sale being in the patent recited to be services rendered by the patentee in the office of the marshal of the kingdom. This piece contained an area of 127.19 acres and is described in the patent as "i kela apana aina a pau e waiho la ma Kahua 1 Hilo ma ka Mokupuni o Hawaii" ("all that piece of land situate at Kahua 1, Hilo, in the Island of Hawaii"). Neither of these portions extend as far mauka as Nahuina. They adjoin each other a part of their length but elsewhere lies between them a third narrow strip. The latter has been referred to at the argument as a part of Kahua 2, another part of Kahua 2 being admittedly mauka of the Ely grant and north of the Pelham grant. In recent years Kahua 2 as a whole has been referred to by the owners and some others as containing three subdivisions, section 1 being that below the government road which runs north and south, section

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2 being that next above the road and section 3 being the portion above the Ely grant. The boundaries of section 1 were settled in 1903 by the commissioner. Sections 2 and 3 are the portions concerning which an adjudication is now asked.

Neither Kahonu's application, dated February 2, 1848, for an award, nor the entry bearing the same date in the mahele book in which the king consents to an award being made to Kahonu as prayed, throws any light on the precise question now being considered as to the identity of the Kahua named in the award itself. Each of these two documents merely describes the land as being "Kahua, ahupuaa, Hilo, Hawaii." These documents, although not introduced in evidence, were examined by us under the power conferred and in pursuance of the duty imposed by Sec. 354, R. L., to "endeavor otherwise to obtain all information possible to enable him to arrive at a just decision as to the boundaries of said lands." On appeal this court possesses in this respect the power granted to the commissioner.

Kahonu was a konohiki. The award to him was of an ahupuaa. While there is some testimony tending to show that the whole of "Kahua" was the ahupuaa, the preponderance of the evidence is, and we find, that the "konohiki Kahua" was Kahua waena or Kahua 2. See the evidence of the following witnesses: F. S. Lyman, Kailihune (w), Kalikanakaloi (w), Kailimai (k) and Gabriel (tr. pp. 156, 211, 212, 262-264, 269, 272, 276-281, 284, 306, 320, 329, 331). See also Territory's Exhibit C, letter of A. B. Loebenstein to J. W. Pratt, who was at the time commissioner of public lands. Kahua 1 and Kahua 3 were never known as konohiki lands. They were known as government lands and were granted for a consideration and not because the patentees had some claim to them by reason of occupation or otherwise under the old system of land tenures in Hawaii. The probability, then, of the only Kahua which remained intact being the konohiki ahupuaa confirms the oral testimony on the subject. The applicant itself so re-

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gards the matter, for in the petition it is the ahupuaa of Kahua 2nd, L. C. A. 5663 to Kahonu, and no other, which is referred to and the settlement of the boundaries of which is desired. Some witnesses did, indeed, testify that the names Kahua 1, Kahua 2 and Kahua 3 were purely of recent adoption and were not known in the days of the mahele, but the Pelham patent shows clearly that in this respect these witnesses were mistaken. That patent on its face purports to grant land in "Kahua 1," and the plat which is attached to and made a part of it mentions "Kahua 2" and "Kahua 3."

In this case the Territory is not concerned with the boundaries of section 2 of Kahua 2. Emily P. Kinney is the only contestant in that regard and she does not appeal from the refusal of the commissioner to decide the controversy. The only issue is as to section 3, so called, of Kahua 2. It is agreed by the parties to the appeal that this section begins at the westerly end of the Ely grant and is bounded on the north in part by the Makea stream and on the south in part at least by the Pelham grant. The parties further agree specifically that if the western or mauka end is found to be at the place, formerly a swamp, called Kananaka, the boundaries shall be adjudged to be as set forth in the answer of the Territory, and if found to be at Nahuina then as set forth in the applicant's petition. The only question of boundaries, therefore, is whether the westerly end of section 3 is at Kananaka or at Nahuina.

Upon this point, while much evidence has been adduced, we find no real difficulty. The Pelham patent, which describes by metes and bounds the land granted, ends one of its courses and distances at Kananaka and then says, directly on the point, "oia ke kihi mauka loa Kahua 2," "that is the extreme mauka end of Kahua 2," and the map attached to the patent names the corresponding point in the survey as "Kananaka, end of Kahua 2," containing also the words "Kahua 2" as the name of the land immediately makai of Kananaka, and the words "Kahua 3" as the name of the land immediately mauka

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of Kananaka. All of this language is too plain to admit of construction. Pelham, who appears to have made the map and drawn the description, may have been, as is claimed by the present petitioner, an inaccurate surveyor, although it may be noted that A. B. Loebenstein, who signed the petition as the agent of the applicant, and who testified in the latter's behalf, says that a good feature of Pelham's surveys was his references to natural monuments. It may be noted, too, that the mere statement that a given point is the end of Kahua 2 is not a matter of ordinary surveying but was something the knowledge of which was gained from his contemporaries. However that may be, it is immaterial whether Pelham in running his courses and distances was usually inaccurate. The government, the grantor in all three instances, adopted his statement concerning the mauka end of Kahua 2 and made it its own and certified to it in a solemn document over the signature of the king. It is immaterial likewise whether such a statement in a patent is conclusive, for in this case we find nothing in the evidence to outweigh it. It is clear, unambiguous and precisely on the point now in controversy and was made at a time when the facts were fresh in the minds of all concerned.

There was also evidence given by Kanananui, a surveyor, showing the existence of a gulch or swale extending from a point near Kananaka on the southwest to a point in Makea stream on the northeast. The location of this gulch corresponds substantially, although not with exactness, with the northwesterly end or side of the section in question as is shown by a dotted line on the Pelham plat. It is conceded by counsel for the petitioner that in so far as there is a divergence between the course as shown by the dotted line and the gulch the latter, as the natural monument, must prevail.

If there were no other evidence in the case, that above considered would require the declaration that Kahua 2 extends

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only to Kananaka. We shall now consider the evidence offered to rebut this showing.

A map and certain triangulation data, said to have been made by J. M. Lidgate, a surveyor, were introduced by the applicant, but Lidgate himself was not called as a witness. The map, and perhaps the triangulation data also, show that their author's conclusion was that Kahua 2 extended as far as Nahuina, but upon what facts, information or study this conclusion was based does not appear in the evidence. For aught that appears to the contrary it may have been based upon no more than we have before us now. Under the circumstances we can attach no weight to these exhibits.

Certain government leases were also introduced in which certain courses and distances of the demised property are described as running "across head of Kahua" to Nahuina. It is sufficient to say of these that it is undisputed that the land immediately below the line terminating at Nahuina is Kahua. The sole issue is as to whether it is a part of Kahua 1, Kahua 2 or Kahua 3, and upon this issue the statement in the leases throws no light.

Registered map No. 939 of the survey department of the Territory includes the outlines of the land of Kahua as a whole as well as of many lands to the north and others to the south and has the words "Kahua 2nd" written substantially across the portion in dispute. This map was presumably based upon patents and leases and perhaps upon some kamaaina testimony, although this was not made to appear by the evidence. It is simply the conclusion of the government surveyor reached on practically the same evidence that we are now considering. See *In re Boundaries of Pulehunui*, 4 Haw. 239, 251. Even though admissible, we deem it insufficient to counteract the showing of the Pelham grant and plat.

Certain maps and tracings made by A. B. Loebenstein, as well as his testimony, were produced by the applicant. It was — Loebenstein's claim, as presented in his testimony and indi-

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cated in his maps, that the land from Kananaka to Nahuina is a part of Kahua 2 and not of Kahua 3. We find ourselves unable to attach any weight to this evidence in view of the statements and claim contained in Loebenstein's letter to Land Commissioner Pratt (Territory's Exhibit C), admittedly written one or two years prior to the date of the present petition, to the effect that there was still a government remainder of Kahua 3. The whole tenor of his letter is directly opposed to the claims made by him at the trial.

As to the kamaaina testimony. F. S. Lyman, whose experience as surveyor and commissioner of boundaries for many years on the Island of Hawaii entitles his testimony to much weight, while he testified with considerable detail concerning the Ely and Pelham grants, concerning the history of land tenures in Hawaii, both before and after the *mahele*, the names of the three Kahuas, and the identity of Kahua 2 as the only *konohiki* land, on the subject of the boundary in question says that "of the Kahuas Kahua 2nd ran farthest mauka," and nothing more. He does not say specifically whether the boundary was at Kananaka or at Nahuina. A. B. Loebenstein's evidence has been already disposed of. J. K. Dillon and D. A. Loebenstein give no evidence on the subject of the mauka boundary. The same is true of Waialani, although apparently an attempt was made to qualify him as a kamaaina. Kailihune (w), basing her testimony upon statements made to her by her father, Kamaka, and her grandparents, Kamaka having been at one time the owner of the *konohiki* land, testified that the *konohiki* Kahua runs to Nahuina (tr. pp. 265, 269), but also testified that there were "difficulties" about the boundary at the time that these statements were made to her (ib. 270). The witness added that Kailimai's grandmother, Makua, who was the caretaker for the *konohiki*, told witness' father about the boundary and then her father told witness. She made many confused and contradictory statements and her evidence was not as clear and definite as it ought to be in

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order to warrant disregarding the record evidence already adverted to.

Kalikanakaloi (w) heard from kamaainas that the konohiki Kahua extended from the ocean to the koa (tr. 280), but there is no exact evidence from this or any other witness as to where the koa began. Noa (k) testified that Wahamu, who in turn is claimed to have been a well informed kamaaina, told the witness that the mauka boundary of Kahua 2 was a little above a koa tree the witness had seen the day before in the absence of Wahamu (ib. 290). Where that particular koa tree stood with reference to Nahuina is not made to appear (ib. 289, et seq). This testimony is not enlightening. Ananaia's statement was that his "forefathers" had told him that the remainder of the ahupuaa between the two streams, after taking out the two grants, extended to koa five fathoms high (ib. 296); that "Kahua" ran to Nahuina (ib. 297). The witness was referring to "all of the Kahua including the Pelham grant and the Ely grant," and later testified that a portion of Kahua 3 "extends from the upper boundary of the Pelham grant up to the end, about a mile," and about one-half mile makai of the mauka boundary of the Pelham grant (ib. 299), and that five-fathom koa was the mauka boundary of "that whole ahupuaa known as Kahua, of the whole tract, Kahua 1, 2 and 3, and not of any particular section" (ib. 300), and still later that Kahua 3 and "Kahonu Kahua" was "the same thing" and that "Kahua 2nd is the Ely grant" (ib. 303). This testimony is conflicting and confused and some of it, at least, obviously incorrect. It is immaterial whether this was due to ignorance, to loss of memory, or to design. It is unreliable.

There were no other witnesses for the applicant on this point. For the Territory, Kailimai (k), Gabriel and Keliikoa (k) testified that the boundary of the konohiki Kahua was at Kananaka and that above that was Kahua 3 (tr. 305, 307, 309, 320, 423, 424). To what degree of weight the testimony of these three witnesses is entitled we need not say. It supports,

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as far as it goes, the written evidence of the Pelham patent. It is sufficient to say that the kamaaina testimony for the applicant cannot avail as against the showing contained in the Pelham patent and map. It is unfortunate, perhaps, that the kamaainas possessing direct knowledge on the subject of boundaries in various parts of the Territory are rapidly passing away, and in their absence the court cannot do better than to base its findings upon the written statements of the king or government, the common grantor, made at or about the time of the mahele.

It may be that in some cases where an issue relating to boundaries is, upon the evidence, close and difficult of determination, great weight should be given to the conclusion reached by the commissioner, on the theory that he had before him the witnesses themselves and was able to observe all of the usual indicia of truthfulness, memory and accuracy, but in this case resort will not be had to that rule partly because the issue is not sufficiently close to require its application and partly because the statement of the commissioner to the effect that the mauka boundary is at Nahuina is not supported by any reasoning expressed in the opinion itself and also because that statement was plainly obiter dictum. He did not decide the point, but refusing to decide it, dismissed the petition.

Our finding is that the westerly or mauka boundary of Kahua 2 is at Kananaka and not at Nahuina. The boundaries of section 3 of Kahua 2 will be certified to be as set forth in the answer of the Territory.

C. S. Smith for Pepeekeo Sugar Co.

W. B. Lymer (*Alexander Lindsay, Jr., Attorney General*, with him on the brief) for the Territory.

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JOHN C. LANE v. JOSEPH J. FERN.

ELECTION CONTEST.

ARGUED NOVEMBER 29, 30, 1910.

DECIDED DECEMBER 6, 1910.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

ELECTIONS—right to contest

The right to contest an election is purely statutory. What constitutes a cause of contest is a question to be determined in accordance with the statutes of the jurisdiction in which the question is raised.

ELECTIONS—question "as to the validity" of ballots.

Whether a ballot marked and cast after five o'clock on the afternoon of election day, and whether a ballot willfully exhibited by a voter to another, after marking and before casting it, should be rejected or counted by the inspectors are, within the meaning of section 56, Act 118, Laws of 1907, questions "as to the validity" of the ballot, within the power of the inspectors to decide and of this court to review on a contest under section 57 of that Act.

ELECTIONS—what constitutes a "decision" by inspectors.

The mere acceptance and the counting of ballots marked and cast after five o'clock on election day constitute "decisions" within the meaning of sections 56 and 57 of Act 118.

ELECTIONS—Id.

The mere acceptance and the counting of ballots exhibited to others by voters after marking and before casting them constitute "decisions" within the meaning of the sections named, at least if the exhibiting was seen by or known to the inspectors at the time of the occurrence or before such acceptance and counting, and perhaps, also, even if the exhibiting was not thus seen or known.

ELECTIONS—what is a "question."

The word "questions" used in section 56 of Act 118 does not refer to issues expressly raised at the polling place on election day by the candidates or their representatives, but to issues capable of being raised although not raised.

ELECTIONS—causes of invalidity of ballots.

The word "hereof" in subsection 5 of section 94, R. L., does not refer to the section itself but to all of the Rules and Regulations for Administering Oaths and Holding Elections promulgated by the president of the Republic in 1894 and now included in chap-

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ters 7, 8 and 9, R. L. It refers not only to improper marks on the face of the ballot but also to other causes of invalidity.

ELECTIONS—meaning of "decision."

A "decision," within the meaning of sections 56 and 57, R. L., may be made, in proper cases, before as well as after the ballots are physically in the box.

ELECTIONS—ballots cast after 5 p. m. valid.

Ballots otherwise valid are not rendered invalid by the mere fact that they were prepared and cast between 5 p. m. and 6:30 p. m. on election day.

ELECTIONS—exhibited ballots invalid.

Ballots wilfully exhibited to others by the voters after marking and before casting are invalid. Whether the inspectors and this court have jurisdiction to so determine (on a contest) with reference to ballots the exhibiting of which was not known to the inspectors, is not decided in this case.

OPINION OF THE COURT BY PERRY, J.

(HARTWELL, C.J., DISSENTING IN PART.)

Briefly summarized, and subject to qualifications hereinafter mentioned, the petition sets up three causes of contest: (1) that in a named precinct the polls were kept open until 6:30 o'clock on the evening of election day and that sixty-four ballots were marked, cast and accepted after five o'clock p. m.; (2) that while a large number of voters were in the polling house engaged in marking their ballots, or about to do so, one McCandless was present and handed pencils to numerous electors and by words and acts endeavored to influence the electors to vote for Fern, and that one Wolter was also present and "instructed" a number of electors "how to vote" and likewise by words and acts endeavored to influence the electors to vote for Fern; (3) that certain voters, their number not being stated, exhibited their ballots, presumably after marking them, to others, and that at times two or three electors were in the same compartment of the polling place marking ballots in plain view of each other. A further statement of the case is contained in the opinion of the chief justice. The demurrer presents two questions, among others, first whether up-

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on the allegations of the petition the court is without jurisdiction to hear the contest, and, second, whether a cause of action is sufficiently set forth. In the view that we take it will be necessary to consider both of these grounds.

It is undoubted that the right to contest an election is purely statutory and must be determined in accordance with the statutes of the jurisdiction in which the question is raised. It is also true that the Hawaiian statutes on this general subject of contests have from time to time undergone change and that the powers of this court other, perhaps, than by writ of *quo warranto*, are not as extensive as they were at times in the past. Beyond this we have not found a study of the former statutes of much assistance. The question still remains, what are the present powers of this court under the statutes now in force? That is a question of construction.

This was an election held under Act 118 of the laws of 1907, "Incorporating the City and County of Honolulu." The direct source of the authority for the conduct of the election and for any contests arising under it is that act; and so also the source and the limits of our jurisdiction in this case are to be found in that act and in other acts by it made applicable. Section 40 of Act 118 provides that "The general laws and rules governing the election of senators and representatives of the Territory shall apply in the election of city and county officers, wherever applicable, except as herein provided." Those general laws and rules are to be found, in the main, in chapters 7, 8 and 9 of the Revised Laws. Sections 56 and 57 of Act 118 read as follows: "All questions as to the validity of any ballot cast at any election held under this Act shall be decided immediately and the opinion of the majority of the Board of Inspectors of Election at each polling precinct shall be final and binding, subject to revision by the Supreme Court of the Territory as hereinafter provided." "Any candidate directly interested, or any thirty duly qualified voters of any Election District may file a petition in the Supreme Court of the Ter-

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ritory setting forth any cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed."

While petitioner contends to the contrary, it may be assumed for the purposes of this opinion that section 57, adding nothing in this respect to Section 56, grants no power to this court to consider questions which the inspectors could not have lawfully considered. It was so held in *Kanealii v. Hardy*, 17 Haw. 9, 12, the court saying, "And likewise the supreme court, in revising any such decision of a board of inspectors, could not consider questions which the board itself could not consider. Section 41" (Section 57) "limits the petition for such revision to causes for reversing, correcting or changing the decision of the board." This assumption is, in other words, that the "decision" mentioned in section 57 is the same decision, and no other, referred to in section 56. It may be assumed also, as is probably the case, that the decision contemplated in these two sections must be "as to the validity of any ballot" and not as to any other cause for invalidating an election, as, for example, not as to any defect in the nomination of the candidate nor as to the latter's eligibility. It may be assumed still further that the causes of invalidity cognizable by the inspectors are simply those mentioned in Sec. 94, R. L.,—although perhaps that view is not capable of as much support in the construction of section 56 as it would be in the case of the construction of section 95, the language of which, with the exception of the provision as to revision by the supreme court, is the same as that of section 56, for of section 95 it can be said, as it can not be said of section 56, that it is a part of the same act as section 94 and immediately follows it, whereas section 56 is in a separate statute and at first reading, at least, might not appear to be limited to section 94 by continuity of thought or expression. Nevertheless, with all of these assumptions, we think that the decisions of the inspectors, if decisions within the meaning of the statute were made (that sub-

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ject is treated below), were "as to the validity of ballots," both with reference to the sixty-four cast after five o'clock and with reference to those which had been exhibited by voters.

Sec. 94, R. L., reads as follows: "If more names are voted for on a ballot than there are offices to be filled; or

"If on a ballot for representatives a larger number of votes are marked than the law authorizes; or

"If a ballot contains any mark or symbol whereby it may be identified, or any mark or symbol contrary to the provisions hereof; or

"If two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person; or

"If a ballot in any other way be contrary to the provisions hereof; then such ballot and all it contains must be rejected.

"But no ballot shall be rejected for containing a less number of names voted for than the law authorizes.

"Each ballot which shall be held to be invalid as aforesaid shall be indorsed on the back by the chairman of inspectors, with his name or initials, and the word 'rejected'." This was originally section 108 (C. L., Appendix, p. 821) of Rules and Regulations for Administering Oaths and Holding Elections, promulgated by the president with the approval of the cabinet, under section 79 of the Constitution of the Republic. The word "hereof," in paragraph five of this section, clearly refers, as we think, not to the section itself, but to all of the rules and regulations so promulgated as one document, otherwise the words in the same paragraph "in any other way" become meaningless, for the "ways" of the paragraph itself are each and all specifically set forth. The expression "in any other way" was certainly intended to add to that specific list "ways" in which a ballot might be contrary to the provisions mentioned. Nor do we find ourselves able to construe this subdivision or paragraph as referring solely to defects on the face of the ballot itself, such as improperly placed crosses,

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blots and marks of identification. Such markings and other physical defects on the paper itself had already been mentioned in that section. Ballots may be "contrary to the provisions hereof" for reasons other than improper marks or physical defects. A few illustrations may be of assistance. The Organic Act, in section 14, names a day in each two years when the regular election is to be held. If one or more ballots, otherwise valid, should, after midnight at the end of election day, be prepared and offered to inspectors to be deposited in the ballot box, would they not be invalid, and would it not, under section 94, be within the power and duty of inspectors to so decide and refuse to permit the voters to cast them? If in a precinct having in full operation a lawful polling place fifty voters, for whom lawfully prepared blank ballots had been surreptitiously secured, should mark the ballots in a saloon or other unauthorized place, and if shortly before closing time a box containing those fifty ballots should be presented to the inspectors at the lawful polling place with the request that the votes so furnished be counted, would not those votes, although in every way correctly marked, be invalid, and would not the inspectors be justified and required, if they did their duty, to then and there so adjudge and reject the attempted ballots? If ballots, in every other way regular, should be offered by women or by persons obviously minors would not the same action be proper and requisite? We cannot but think that these questions answer themselves. In each such instance the ballot would be "contrary to the provisions hereof." Not every piece of paper correct in color and apparently correct in form is a valid ballot. The time and the place of the marking and the casting, and the identity and the qualifications of the person offering it may all be, under the particular statutes in force, elements essential to rendering it a valid ballot.

In our opinion the fact that a ballot was prepared and cast after five o'clock presents an issue of validity or invalidity to be determined in view of the provisions of the statute. So also

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does the fact that the voter (not disabled, under Sec. 89, R. L.), after marking his ballot, and before casting it, wilfully exhibits it to another. How these two questions of alleged invalidity should be determined, whether for or against the contentions of the petitioner, is a wholly distinct matter. Both were questions capable of being "decided" by the inspectors one way or the other under section 56 of Act 118.

But it is said that it does not appear from the petition that the inspectors made any "decision" concerning the ballots claimed to have been exhibited. Whether or not it can be held that there was a decision relating to the ballots the exhibiting of which was not seen by or known to the inspectors at or shortly after the exhibiting, need not be determined on this demurrer. It is a question which has not been argued and which may not arise at the trial. Since, however, the petition is held amendable in certain respects, it becomes necessary, in order not to encourage the petitioner to return into court with an amended petition simply to be then told that the court in no event has jurisdiction, to consider further whether there was a "decision" of the inspectors as to those ballots the exhibiting of which was thus seen by or known to them. In our opinion there was. The mere acceptance of the ballots with such knowledge and the subsequent counting of them constitute decisions. No formality is required or contemplated by the statute. There is no requirement that the determination be reduced to writing. No set words, written or oral, are necessary. No words at all are necessary. Acts speak louder than words, and what more effective can there be as an announcement of the conclusion reached than the acceptance or the rejection, as the case may be, of a ballot? For example, the statute at least appearing to contemplate a closing of the polls at five o'clock and the polls having been kept open until 6:30, could any one have been misled or left in ignorance, after the acceptance and counting of the sixty-four ballots, as to the decision of the inspectors that those ballots were valid? We think

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not. The same is true of the acceptance and counting of the exhibited ballots, if the exhibiting was with the knowledge of the inspectors.

It may be said that the use of the word "cast" in the phrase in section 56, "all questions as to the validity of any ballot cast * * * shall be decided," shows an intent on the part of the legislature to confine decisions to ballots which are already in the box and excludes the legal possibility of a decision prior to the physical presence of the paper in the box. It seems to us that this position would not be sound. A ballot may be cast, within the meaning of this section, which is not yet physically in the box. It is cast when the voter has exhausted all reasonable efforts to have it placed in the box. Inspectors certainly are not compellable, closing their eyes to irregularity and to all glaring causes of invalidity, to accept every paper offered as a ballot and put it in the box. If a voter after receiving a blank ballot openly and defiantly leaves the polling place and marks his ballot outside at the dictation and in full view of a candidate, and then offers to place his ballot in the box, or if such offer be made by a person who admittedly has already cast on the same day a ballot in the same precinct, or by an alien, or by a woman, or by one indisputably a minor,—in every such instance inspectors may then and there "decide," within the meaning of the statute, that the ballot is invalid and may reject the same. That is one of the things that they are there for. The legislature so intended. It would be proper practice, undoubtedly, in such cases, for the inspectors after marking them for identification to set aside and preserve, for possible use in this court on a contest, all such ballots; but the fact remains, as we think, that the decision contemplated in the statute may take place before, as well as after, the physical presence of the paper in the box. The absence of any provision requiring the marking of rejected ballots for identification, whether such rejection takes place before or after the placing of the paper in the box, does not militate against this view. A "decision"

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may be with reference to ballots which after as well as before the decision are unidentified and whether such lack of identification results from mistake, design or impossibility. Section 62 of Act 118 evidently contemplates the occurrence of cases such as these "where a correct result cannot be ascertained because of a mistake or fraud on the part of the inspectors."

The mere acceptance, therefore, of the ballot and the placing of it in the box, if done with knowledge of the exhibiting, was a decision within the meaning of the law and subject to revision by this court.

It is further said that there was no decision concerning the exhibited ballots because there was no "question" within the meaning of section 56. It will be recalled that that section provides that "all questions * * * shall be decided." The word "question" is ordinarily used in at least two senses, as denoting (1) an issue expressly raised by the parties to a judicial proceeding and to be determined by the court, and (2) an issue capable of being raised, although not raised. Both are familiar uses of the word. In which sense was it used here? We think the latter. All proceedings at polling places on election day are necessarily more or less informal. At times at least in the day there is great stress of work and but little time for formalities. Trained lawyers are not expected to take part in the conduct or watching of elections. In the great majority of cases the candidates and agents who attend to watch proceedings are without knowledge of the technical procedure required in courts to raise a question within the first meaning of the word above mentioned. No procedure is prescribed in the act for noting exceptions or for keeping a record of the raising of questions, this of itself indicating that questions in that sense were not contemplated by the legislature. No *right* is *secured* by the statute to watchers to examine ballots for improper marks, etc., before the making of a decision thereon by the inspectors. It would be unreasonable to hold, under the circumstances, that men who have no opportunity (what is

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done by mere courtesy is immaterial) secured by the law of right to make such examination and to ascertain causes of invalidity must specifically raise questions or be thereafter barred from the right to a revision by the supreme court. If this is the correct view concerning defects on the face of the ballots it must be so also concerning other causes of invalidity. The word "question" must have one and the same definition in all instances. We can see no room for a distinction in that respect between one class of causes and another class, or any necessity or justification for requiring any more formal, more definite or different "question" concerning exhibited ballots than concerning any other ballots.

It would be impracticable, further, to hold that "questions" refers, in some classes of cases, to a mental state or process in the minds of the inspectors,—that it is essential, in other words, that the inspectors in counting each ballot observe the alleged ground of the invalidity. If it were so held, would a distinction be made, as to the power of this court to review, between markings which were observed by inspectors and markings which were not? Would it be made a question of fact, in each instance determinable upon the evidence of the inspectors? And how would the jurisdiction be affected, for example, by a failure of memory on the part of the inspectors as to whether or not they had at the time observed the possible defect?

In our opinion, by receiving and also by counting the ballots cast after five o'clock and the exhibited ballots, if with knowledge, the inspectors decided, favorably to the voters, the "question" of the possible invalidity of those ballots and those decisions are now "subject to revision" by this court under section 56, upon a petition duly filed under section 57.

Were the ballots cast after five o'clock invalid? R. L., Sec. 78, prescribes that "The polls shall be opened by the inspectors at 8 of the clock upon the morning of the election day, and shall be kept open continuously until 5 of the clock in the afternoon of said day, unless all of the registered voters of the precinct shall

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have polled their votes previously to that time, after which the polls shall be closed and the votes counted as in this chapter provided." It may be noted in passing that while it is required that the polls be kept open until five o'clock, there is no express prohibition that they may not continue open after five o'clock. It is, indeed, provided that the votes shall be counted after five, but how much after or whether immediately after is not stated. It may be that it was not even an irregularity to receive the sixty-four votes, particularly if, as in *Kulike v. Fern*, 19 Haw. 278, the voters were all within the polling place before five o'clock. However that may be, and even if there was an irregularity the ballots were in our opinion not illegal. The provision is directory only. There is no penalty for its violation save such as may be found in chapter 9, relating to Offenses against Election Laws, by way of fine or imprisonment for the offending inspectors or, possibly, any one inciting them to the commission of the offense. There is no provision that votes cast after five o'clock shall not be received or shall be invalid. The object of the election was to obtain the free and untrammelled expression of the will of the voters concerning the choice of candidates for the office of mayor. There is no contention that this end was not accomplished. Voting after five o'clock and until 6:30 did not interfere with the desired expression of the voters' choice. We do not mean to say that cases may not occur of a violation of the statute in this respect so gross, as, for example, the receiving of votes after midnight, as to require declaring the votes so received, and perhaps the whole election, void. But this is not such a case.

The authorities on this subject are not in entire accord. The weight of reason is in support of the view just presented. While statutes differ in different jurisdictions, and while, therefore, not as much aid is to be derived from decisions elsewhere as might otherwise be the case, still a few quotations will not be out of place.

"If the law itself declares a specified irregularity to be fatal,

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the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration, the judiciary will endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial." *Bowers v. Smith*, 111 Mo. 45, 61, 62.

"Where there has been a fair and free expression of the popular will, a mere irregularity in conducting an election will not invalidate it." *Clark v. Leathers*, 5 S. W. (Ky.) 576, 578.

"But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." *McCrary, Elections*, §225.

"It does not appear that these irregularities had any effect upon the voting, the counting or the returns, and consequently, for present purposes they are immaterial." *Lehlbach v. Haynes*, 54 N. J. L. 77, 81, 82.

"The particular hour in the day is not the essence of the thing required to be done. Should inspectors on a cloudy day, and misled by a defective timepiece, close the polls a few minutes *before* sundown, or receive a few votes *after* that hour, if the time of the day be of the essence of the thing, the whole election for that district would be void. I cannot subscribe to this doctrine. I think the statute is directory." *People v. Cook*, 8 N. Y. 67, 92, 93.

"A statute is to be regarded as directory merely if the directions given to accomplish a particular end may be violated and yet the given end be in fact accomplished, and the merits of the case unaffected, and this rule is applied where the statute gives directions as to the manner of holding elections; but the same rule cannot be applied to the constitution of the State." *Varney v. Justice*, 86 Ky. 596.

"It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and, from the current of authority,

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the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to affect an obstruction of the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."—*Jones v. State*, 153 Ind. 440, quoted and adopted in *Willis v. Kanealii*, 17 Haw. 243, 247.

See also *McCrary on Elections*, §227; *Cleland v. Porter*, 74 Ill. 76, 78, 79; *Patton v. Watkins*, 131 Ala. 387 (31 So. 93, 94); *Holland v. Davies*, 36 Ark. 446, 450; and *Fry v. Booth*, 19 O. St. 25, 27.

We think that the allegations in the petition concerning the receipt of votes cast after five o'clock are immaterial.

As to the ballots exhibited, Sections 87 and 88 of the Revised Laws read as follows. "No voter shall exhibit his ballot to any other person, nor shall any person look at or ask to see the contents of the ballot of any voter, except as provided in section 89; nor shall any person within the space set apart for a polling place attempt to influence a voter in regard to whom he shall vote for. When a voter is in the balloting compartment for the purpose of marking his ballot, no other person shall, except as provided in section 89, be allowed to enter the compartment or to be in a position from which he can observe how the voter is marking his ballot." "No person shall take a ballot out of the polling place; and if any person having received a ballot shall leave the polling place without first delivering the same to the inspector of election as provided in this chapter, or shall wilfully exhibit his ballot except as provided in section 89, after the same shall have been marked, he shall thereby forfeit his right to vote, and the

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chairman of inspectors shall cause a record to be made of such proceeding." Differing from the subject of the time of the closing of the polls, this provision is express and unambiguous that a voter who shall wilfully exhibit his vote to another "shall thereby forfeit his right to vote." It is precisely as though the language were that the vote "shall not be counted" or "shall be invalid." The language is too clear for construction or argument. It is mandatory. The disregard of the provision may well, and ordinarily does, interfere with that free and untrammelled expression of the will of the voters which, as above noted, it is the main object of the law to secure. The secrecy of the ballot is an essential part of the whole scheme of our election laws. It is essential to its purity. It would be an undoubted incentive to bribery and fraud to have it known that a briber could call on the bribed to prove by exhibiting his ballot just before casting it that he was performing his part of the contract. This consideration, to be sure, would not confer jurisdiction on this court if none were otherwise conferred by the statute, but it tends to show, with other considerations, that the provision is mandatory and that its violation renders the ballot invalid, and that therefore, under paragraph five of section 94, the ballot is "contrary to the provisions hereof."

"Every positive requirement, therefore, which, if disobeyed, would necessarily defeat this object" (the secrecy of the ballot) "should be held mandatory." *Hall v. Schoenecke*, 128 Mo. 661, 669.

"I am aware that many cases may be cited in which powers relating to the method of conducting elections are held directory. But certainly the better authorities and the better reasoning do not justify the *counting* of a ballot which by the tenor of the act it is provided shall not be received." *Attorney General v. May*, 99 Mich. 538, 559.

See also *McCrary, Elections*, §227, and *Attorney General v. McQuade*, 94 Mich. 439, 440, 443.

It remains to be noted that under sections 87 and 88 the

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exhibiting must be done *wilfully* in order to cause a forfeiture; that the exhibited vote must have been seen by another, a vote not being exhibited within the meaning of the law which is merely held so that another can see, who does not in fact see; that in order to support a cause of action there must have been fifty-two or more invalid votes; and perhaps, also, although upon this question no opinion is expressed, that in order to a "decision" concerning exhibited ballots the exhibiting must have been seen by or known to the inspectors at or shortly after the time of the occurrence. The reason for the requirement concerning fifty-two invalid votes is obvious. If the total number of invalid votes is less than the majority of the successful candidate it may well be assumed at the threshold that they were cast for the respondent, for the result of the election will still remain the same. *Sweepston v. Barton*, 39 Ark. 549, 557. None of these matters mentioned in this paragraph are alleged in the petition. The petition, however, is capable of amendment as to all of them if the facts justify that course.

The alleged acts of McCandless and Wolter, in so far as they were contrary to the law, do not of themselves invalidate the election or any of the votes cast. The statutes do not so provide expressly and must therefore, within the rules above mentioned, be regarded as directory. The remedy, if any, is by fine or imprisonment under chapter 9 of the Revised Laws. It need scarcely be added that such conduct is highly reprehensible and ought to be punished if the law permits it.

In our opinion the demurrer should be sustained on the ground, not that the court is without jurisdiction, but that the facts averred do not constitute a statutory cause of contest, with liberty to the petitioner to amend within ten days if so advised.

G. A. Davis, A. F. Judd, R. W. Breckons and G. S. Curry for petitioner.

W. W. Thayer and C. W. Ashford for respondent.

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OPINION BY HARTWELL, C.J., DISSENTING IN PART.

Petitioner, who was a candidate for the office of mayor of the City and County of Honolulu alleges that at the election held November 8, 1910, there were violations of the election laws in the sixth precinct of the fourth election district by reason of sixty-four electors having "voted after five o'clock and cast their ballots after five o'clock in the afternoon of the said day, whose ballots were counted by the election inspectors for the office of mayor," the petitioner claiming that those votes "were illegal and should not have been counted and returned," and that the "sixty-four voters had no right to vote after five o'clock in the afternoon," wherefore he claims all the ballots cast in the sixth precinct "were illegal and void and should not have been counted;" that after five o'clock in the afternoon of the election day there were over sixty people in the polling booth at said precinct "at one time and two or three electors about to cast their ballots and actually engaged in marking the same were in the same compartment in said polling booth talking to one another and marking their ballots in the presence of each other openly;" that Lincoln L. McCandless, candidate for the office of delegate to congress, was in the polling booth after five o'clock and handed "pencils to numerous electors for the purpose of marking their ballots and was trying to influence electors by words and acts to vote for" Fern (who has been officially declared to have been elected mayor), and that Wolter, a candidate for the office of representative of the fourth district, was in the booth and "instructed a large number of electors after five o'clock * * * how to vote and endeavoring by acts and words to influence certain electors in said polling booth to vote" for Fern for mayor, wherefore, as the petitioner claims, the votes cast in the sixth precinct were illegal and none of them should be counted and he "received a majority of twenty-six votes legally cast over the said Joseph J. Fern for the said office of mayor;" that between four o'clock and half-past five o'clock in the afternoon of the election day

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"there were at all times two or three electors in each compartment of the polling booth marking their ballots together and in the presence of each other without secrecy, openly and in flagrant violation of law," and that by reason thereof the votes in that precinct, deposited in the ballot box for the office of mayor were illegally cast and that about sixty-four votes were so cast and illegally deposited in the ballot box and should have been rejected and not counted and that by reason thereof Lane received a majority of twenty-six of all the legal votes cast for the office of mayor; that the secrecy of the ballot was not observed nor the provisions of Sec. 87 R. L. (relating to secrecy of the ballot) carried out or followed in the polling booth of the sixth precinct where the election was being conducted, nor the provisions of Sec. 85 R. L. (as to method of voting) observed or followed from 2 P. M. until 6:30 P. M. of the election day; "that divers electors exhibited their ballots and marked the same openly in said polling booth, and divers electors marked their ballots two or three together in the same compartment at the same time." The petitioner prays that the finding and declaration of the election inspectors of the sixth precinct that Fern received 230 votes and the petitioner 150 votes be declared null and void; that the same be reversed; that it be adjudged that no legal votes were cast there and that all the ballots counted by the inspectors for the office of mayor be declared illegal, and that the total vote in that precinct be rejected and that upon proof of these allegations the court adjudge that the petitioner was elected to the office of mayor, and for such further order and relief as the circumstances of the case may require and as the law, pleadings and proofs shall warrant.

The petition alleges, and it appears by the annexed copies of tabulated returns, that 3206 votes were cast for Fern and 3154 for Lane, making a majority of 52 for Fern, and that of the votes cast in all other precincts than the sixth precinct Lane received a majority of 26.

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The respondent demurred to the petition on the ground that it does not show that the court has jurisdiction of the subject matter thereof and does show that the court is without jurisdiction in the premises; that the petition is indefinite and insufficient in failing to set forth facts or circumstances rendering it probable *prima facie* that sufficient of the alleged illegal votes were cast for the respondent to invalidate or change the result of the election or that the sixty-four votes were not cast for the petitioner and hence did not change the result of the election; that the petition does not show that any votes were illegally cast or that the alleged illegal course at the election in anywise influenced its result, and that the relief prayed for is not authorized by any law of Hawaii.

The petitioner's motion to dismiss the demurrer as not authorized by the statute relating to election contests was denied and the demurrer was argued.

Sec. 57 of Act 118, S. L. 1907, entitled "An Act to Incorporate the City and County of Honolulu," reads as follows:

"Any candidate directly interested, or any thirty duly qualified voters of any Election District may file a petition in the Supreme Court of the Territory setting forth any cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed."

It is claimed by the petitioner that the case presented in his petition is properly brought under the provisions of Sec. 57 above quoted; and that the "cause or causes" for reversing "the decision of any Board of Inspectors" include not only decisions by the inspectors upon the validity of ballots, in rejecting ballots not in accordance with the requirements of Sec. 94 R. L., but also their action in counting ballots cast after five o'clock and allowing the violations of the election laws alleged in the petition.

The respondent's contention is that the provisions of Sec. 57 refer to those of Sec. 56, or, as he puts it, that Sec. 57 is the complement of Sec. 56. Sec. 56 reads as follows:

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"All questions as to the validity of any ballot cast at any election held under this Act shall be decided immediately and the opinion of the majority of the Board of Inspectors of Election at each polling precinct shall be final and binding, subject to revision by the Supreme Court of the Territory as hereinafter provided."

The respondent insists that none of the alleged violations of the election laws, whether on the part of unauthorized persons in the polling booth or of the inspectors in keeping the polling booth open after five o'clock and allowing votes cast after that hour to be counted, were decisions by the board of inspectors on any "questions as to the validity of any ballot."

There is much diversity in the statutory causes for which elections may be contested in the several states. In California, for instance, a contest may be made for "malconduct" and not merely for express violations of the election laws on the part of any judge of elections and also "on account of illegal votes." The California Code of Civil Procedure is as follows:

"TITLE II. Of Contesting Certain Elections. §1111
Who may Contest, and Grounds of Contest. Any elector of a county, city and county, city or any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes:

"1. For malconduct on the part of the board of judges, or any member thereof.

"2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.

"3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in title four, part one, of the Penal Code.

"4. On account of illegal votes."

Under this law, since neither voters nor candidates have any control over election officers, and to upset elections because such

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officers have failed strictly to comply with the law, as in matters relating to arrangement of polling places, would be to encourage irregularities committed for the very purpose of invalidating an election, an election is not invalidated by reason of such non-compliance with the requirements of the election law. *Hayes v. Kirkwood*, 136 Cal. 396. An entire vote of ward or of city should not be rejected for malconduct of the election board when it appears that everything was done in good faith and that no fraud was committed. *Atkinson v. Lorbeer*, 111 Cal. 419. The fact that a candidate wrongfully procured his nomination or had his name illegally placed upon tickets is not ground for contest under the law quoted. *Powers v. Hitchcock*, 129 Cal. 325. Aiding and abetting a registering officer in the illegal registry of voters does not constitute ground for contesting an election. *Meredith v. Christy*, 64 Cal. 95. It is not cause for an election contest that the candidate declared elected had not complied with the purity of election law. *Treanor v. Williams*, 145 Cal. 315.

Hawaiian legislation upon election contests has undergone many changes. During the time when only representatives were elected and, under the constitution of 1852, the legislature sat in separate houses of nobles and representatives, whenever fifty or more of the voters of any district should petition the house setting forth that any person chosen as representative for the district had "been elected through bribery or any other unfair means, or that he is not qualified according to law," the house was required to institute an inquiry as to the truth of the charges and if they found them to be true to "immediately declare his election null and void." Sec. 796 C. C. The constitution of 1887, which retained the single house legislature, under the constitution of 1864, consisting of nobles and representatives sitting together, in Art. 58, made the nobles elective.

In Act 76, S. L. 1888, amending and consolidating the election laws of the Kingdom, introducing the Australian ballot law, are the following provisions for annulling elections and

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vacating seats of elective members: It is declared in Sec. 75 that the seat of any elective member of the legislature should become vacant if he should die, resign or be convicted of any of the offenses disqualifying persons from being elected or of a violation of any of the provisions of the act, as well as for bribery, fraud, miscarriage or default of the member or of his agent whereby his election might be vitiated, and in Sec. 76 that upon petition of not less than thirty voters of the district in which there was an alleged vacancy setting forth "any cause or causes alleged for such vacancy," the legislature should examine the question of the vacancy or dispute thereon and take full evidence "on all matters pertaining thereto" and if it found the seat vacant or that it ought to be so declared a new election should immediately be ordered by the Minister of the Interior on notice of such vacancy from the President of the Legislature." Sec. 78 provides for proceedings in court for annulling elections that: "In addition to the methods hereinbefore set forth for vacating any seat in the Legislature, any candidate, or any ten persons who have voted or were entitled to vote in the district, may file a petition addressed to the Chief Justice of the Supreme Court, setting forth any cause of causes, why an election shall be vacated or a seat be declared vacant." Sec. 80 declares that at the hearing the justice "shall cause the evidence to be reduced to writing in full or sufficiently to ascertain all of the facts involved, and shall thereupon give judgment, stating all of his findings of fact and the law thereupon, which shall then be transmitted in full to the Minister of the Interior, provided no appeal shall be taken. If such finding shall be that the election was invalid, and the seat therefore vacant, a new election shall at once be ordered." This law enumerates in Sec. 75 the causes of vacating the seat of any elective member of the legislature. Under Sec. 78 the petition may set forth "any cause or causes."

It is unnecessary for the purpose of the present case to say whether under that statute an election could be vacated for any

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"cause or causes" not therein enumerated. The act makes no other provisions for correcting decisions of inspectors as to the validity of ballots, but provides, Sec. 62: "All questions as to the validity of any ballot shall be decided immediately, and the opinion of a majority of the Inspectors shall be final and binding, except as hereinafter provided."

Act 86 S. L. 1890, amending and consolidating the election laws of the Kingdom, contains in Sec. 87 the same provisions for proceedings in court for vacating elections, with the amendment that "The hearing may be had before any Justice of the Supreme Court and shall be held in the judicial circuit wherein the election is disputed," and further providing that the court should "have no jurisdiction over any such case during the session of the legislature."

The constitution of 1894 (Art. 38), vesting the legislative power of the Republic in a legislature consisting of two houses styled the senate and house of representatives, sitting separately, provides (Art. 40): "In case any election to a seat in either House is disputed, and legally contested, the Supreme Court shall be the sole judge of whether or not a legal election for such seat has been held; and, if it shall find that a legal election has been held, it shall be the sole judge of who has been elected." It will be observed that the power is very great under this article and authorizes the supreme court to determine generally whether an election is legal or not.

Act 8 of the Laws of the Republic of Hawaii, relating to elections and contested seats in the legislature, enumerates in Sec. 7, the causes for which the seat of any elective member of the legislature shall become vacant, being substantially the same as those enumerated in the former law, and provides in Sec. 8: "Any candidate directly interested, or any thirty duly qualified voters of any election district, may file a petition in the Supreme Court, setting forth any cause or causes why an election shall be declared void, or a seat in the Legislature vacant, or the decision of any Board of Inspectors, or of the Marshal

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or any Sheriff, reversed or changed." Sec. 12 provides that if at a hearing of such petition the "finding shall be that the election was invalid or the seat vacant a new election shall at once be ordered."

In none of the laws cited was there any authority for the court to declare who was elected, its power being confined to declaring an election void in any of the cases enumerated.

By the Organic Act the legislature passes upon the qualifications of its members and by implication the supreme court could not take jurisdiction of any petition to declare void the election of a senator or representative or to determine what candidate was legally elected. Act 39 S. L. 1905, commonly referred to as the County Act, as well as Act 118 S. L. 1907, incorporating the City and County of Honolulu, contains only that portion of the above cited laws which authorizes this court to hear petitions in contested elections to reverse, correct or change the decision of any board of inspectors on "questions as to the validity of any ballot."

The legislature has not granted to this court the authority to declare elections void for illegal acts other than are shown in inspectors' decisions upon the validity of ballots, and those are the only decisions which can be reversed or changed in a proceeding brought under Sec. 57, Act 118, S. L. 1907. The petitioner does not aver in his petition that any such question came before the board for its decision or was decided, unless counting the sixty-four ballots cast after five o'clock is a decision, in the absence of any question raised, that those ballots were valid.

But it is conceded in argument by the petitioner that the "questions" for the board of inspectors to pass upon in reference to the "validity of any ballot" are confined to the provisions of Sec. 94 R. L. (Sec. 108, Ap. C. L.), reading as follows:

"Rejected ballots. If more names are voted for on a ballot than there are offices to be filled; or,

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"If on a ballot for representatives a larger number of votes are marked than the law authorizes; or,

"If a ballot contains any mark or symbol whereby it may be identified, or any mark or symbol contrary to the provisions hereof; or,

"If two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person; or,

"If a ballot in any other way be contrary to the provisions hereof; then such ballot and all it contains must be rejected.

"But no ballot shall be rejected for containing a less number of names voted than the law authorizes.

"Each ballot which shall be held to be invalid as aforesaid shall be indorsed on the back by the chairman of inspectors, with his name or initials, and the word 'rejected.'"

It is apparent that this section only is referred to in the following section:

"Sec. 95. Validity of ballot decided immediately. All questions as to the validity of any ballot shall be decided immediately, and the opinion of a majority of the inspectors shall be final and binding."

It is true that by Sec. 40 of Act 118 S. L. 1907, "The general laws and rules governing an election of senators and representatives of the Territory shall apply in the election of city and county officers, wherever applicable, except as herein provided," but these laws and rules governing such elections, if they had not been repealed expressly or by implication, as they have been, would not authorize this court to hear any election contests other than those which are provided for in Act 118. *In re Contested Election*, 15 Haw. 323, 332.

No question then is presented in this case upon any of the matters referred to in Sec. 94, and while the term "illegal votes" or "illegal ballots" is frequently used to include votes or ballots cast by a person disqualified to vote or who has been illegally induced by bribes or intimidated, a ballot which is legal in form and legally marked before five o'clock is equally a legal ballot after five o'clock and does not become illegal merely because it is cast after that hour. The validity of the

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ballot requires that it be in the form required and that it be marked by the voter in accordance with the requirement of the statute and not otherwise. A question of the validity of the ballot is not involved in the inspectors' duty, if such be their duty, to close the polls at five o'clock. If any wrong is done or mistake made by them in keeping open longer it might come under the head of "malconduct" and be the cause of contest under such statutes as those of California, above cited. Giving the broadest scope then to our statute and assuming solely for the purpose of this case, and not as a precedent for future cases, that it was unnecessary that any question should be presented for the inspectors to pass upon concerning the validity of the ballots but that their mere act of counting ballots is to be treated as a decision, still it is clear that a case, such as is authorized by the statute, is not presented by the petitioner. Nothing is gained by considering decisions made elsewhere under statutes unlike our own.

"The diversity of state legislation upon the subject renders the local decisions of one state of little aid in construing the election laws of another. Each act must be viewed in the light of the legislative will, as expressed, and hence the citations of authorities by appellee under the particular enactments of different states, such as California and Pennsylvania, are inapplicable here. *Bull v. Southwick*, 2 Gildersleeve (N. M.) 321, 340.

Thus the case from 125 Cal. 16, relied on by the petitioner, was brought under a statute similar to our quo warranto, as amended by the act of 1907, authorizing actions for usurpation of an office and authorizing the court to determine whether the incumbent of the office held it lawfully or unlawfully. The only question in that case argued by counsel or discussed by the court was whether at the election of the mayor of San Francisco the polls had been legally closed in two of the city wards at five o'clock, as required by the general state law, or, as was done in the other wards, at sundown, as required by the mayor's proclamation issued under an ordinance claimed to

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have been authorized by the city charter. The court, holding that the charter authorized the ordinance and therefore that sundown was the correct hour for closing the polls, necessarily held that the election was invalid in the wards in which the polls were closed at five o'clock.

In Kentucky the law appears to authorize the court to annul an election if it is illegal; and it was held in the cases cited from 86 Ky. 596, and 104 Ky. 842, relied upon by the petitioner, that keeping the polls open long after sundown, the time required by the constitution, in connection in the second of these cases with other grave violations of the elections laws, made the elections illegal.

On the other hand, the considerable number of decisions cited by the respondent, that non-compliance with statutory requirements do not invalidate an election on the ground that no harm was done or that the statutory requirements were merely directory, have no bearing upon the present case which rests upon the lack of judicial power, on any of the grounds named in the petition, to annul an election or to declare who was elected.

As held in *Ellingham v. Mount*, 43 N. J. L. 470, 473:

"These proceedings calling in question this election, were instituted by the authority of the provisions of the election law embraced under the ninth head, which relates to contested elections of county and township officers. Rev., p. 355. The entire remedy thus given is a statutory device, and no part of it has any existence outside of this enactment; and, upon inspection, it will be found that the extent of this remedy has been carefully defined. The act, plainly, does not give this method of redress in every case in which an illegal election has occurred. If such had been the design, judicial jurisdiction over the subject would have been given in general terms; but, so far is this from having been done, the grounds of such jurisdiction are carefully specified and described; such grounds being distributed under seven distinct heads."

"The statute enumerates the causes for which an election may be put in contest by force of its provisions, and conse-

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quently an election cannot be called in question in such a procedure except for one of the causes so designated."

In *Clarke v. Rogers*, 81 Ky. 43, it was held that the statute having provided the means of contesting elections "where no provision has been made applicable to the particular case, the result, as certified by those holding the election, must determine the issue."

To summarize: The petition alleges violation of election laws on the part of voters in showing their ballots by marking them so that the marks could be seen by another on the side of the polling booth or in company with another voter in the voting compartments, contrary to the provisions of Secs. 87, 88, R. L., whereby, if the exhibition of the ballot is "wilful," such voter, by Sec. 88 R. L., "shall forfeit his right to vote;" and on the part of the board of inspectors in permitting more persons than are authorized by the statute, Sec. 79 R. L., to be within the space around the polling place set apart in order to prevent interference with the conduct of the election, and in keeping the polls open for about an hour after five o'clock and counting the ballots, about sixty-four in number, cast in that time by voters who had voted after that hour, Sec. 78 R. L. prescribing that the polls be kept open until five o'clock, unless all the voters registered in the precinct shall have voted sooner, "after which the polls shall be closed and the votes counted."

No question is presented as to the invalidity of any ballot for noncompliance with the provisions of Sec. 94 R. L. in any of the ways therein enumerated or in any other way contrary to the provisions of that section, in any of which cases the inspectors are required to mark "rejected" on the ballots.

The court being agreed that no cause of contest is shown by the action of the inspectors in keeping the polls open and counting the votes cast after five o'clock, the only question on which the court has not agreed is upon the necessity of a decision upon the validity of ballots cast by voters who had wil-

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fully exhibited them. If acceptance and counting of such ballots were regarded as deciding that they are valid, and if the inspectors have not set the ballots apart for identification in order that their decision may be reviewed in a contest upon its correctness, then in every such instance, and whether the inspectors were right or wrong, as those ballots are not before us, it would be impossible to take evidence of the voter or of others of the exhibiting or of its wilfulness, for it may be done innocently and others may not have seen the names voted on the ballot.

Hence the necessity of a decision being made, however informally, by the inspectors upon a question as to the validity of any ballot cast at an election if a contest is to be made upon the correctness of the decision. Whether the question of the validity of any ballot be presented when it is presented or after the polls are closed, it is ballots which are 'cast' to which the decision of the board of inspectors relates.

If ballots are accepted and counted without objection, and perhaps without the attention of more than one inspector having been drawn to the fact that they were marked so that others might, and perhaps did, see the marks, or if he thought there was no exhibition of the ballots, or none wilfully made, there would be no decision on the subject made by the board, and no contest on the decision could be made.

If violations of election laws by inspectors, voters, candidates or others make an election illegal, it might be so decided in quo warranto proceedings in which the court passes upon the seriousness of the violations of law from their possible effect upon the election or upon the law being mandatory, whatever the result of its violation, but not on a contest upon decisions of inspectors which have not been made and to which the statute authorizing election contests does not refer. The effect of this conclusion on future elections will perhaps be that the inspectors, voters and candidate will be more alert

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and observe the requirements of the law and any violations thereof.

I agree that this case is not to be decided on "technicalities," a term often used for refinements of law, but on the broad and only safe ground for any judicial tribunal to take, namely, that, as I think, the law does not authorize the case to be heard or decided on any of the grounds named in the petition. To decide otherwise would be to usurp legislative functions,—a thing which is abhorrent to free institutions. No matter how urgent the demand for the exercise by the court of authority not granted to it by the legislature, the answer must be, the court declares and does not make the law.

I agree that the demurrer should be sustained and the petition dismissed on the grounds named in the opinion of the majority, but I also think that for the reasons above named there was no decision in fact or substance of any ballots having been wilfully exhibited, and that the demurrer ought to be sustained on that ground also. In that respect only I non-concur with the opinion of the court.

No. 19. JOHN C. LANE v. JOSEPH J. FERN. Election Contest. Petition for Rehearing. Filed December 6, 1910. Decided December 6, 1910. Hartwell, C.J., Perry and De Bolt, JJ. Per curiam. The petition consists simply of a request for permission to further argue the questions presented by the demurrer. It sets forth none of the well known grounds for a rehearing. The petition is denied without argument under Rule 5.

G. A. Davis, A. F. Judd, R. W. Breckons and G. S. Curry for petitioner.

W. W. Thayer and C. W. Ashford for respondent.

No. 19. JOHN C. LANE v. JOSEPH J. FERN. Election Contest. Petition (second) for Rehearing. Filed De-

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ember 6, 1910. Decided December 8, 1910. Perry and De Bolt, JJ., and Circuit Judge Whitney in place of Hartwell, C.J. Per curiam. For the purposes of this ruling it may be assumed that this second petition may be considered on its merits, after the denial of the first petition for rehearing. This petition, like the first, sets forth none of the well known grounds for a rehearing. It is denied without argument under Rule 5.

G. A. Davis, A. F. Judd, R. W. Breckons and G. S. Curry for petitioner.

W. W. Thayer and C. W. Ashford for respondent.

IN THE MATTER OF THE PETITION OF JEW YUEN
MOW FOR A WRIT OF HABEAS CORPUS.

ARGUED DECEMBER 7, 8, 1910.

DECIDED DECEMBER 8, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF HARTWELL, C.J.

HABEAS CORPUS—*expiration of commitment.*

A commitment to a sheriff to detain M. "to await until the Governor of the State of California shall have the opportunity to issue a requisition to the Governor of the Territory of Hawaii and the Governor of the Territory of Hawaii order the delivery" of M. to the Governor of California, even though validly issued, does not justify the detention of M. after the issuance of the requisition and the order.

OPINION OF THE COURT BY PERRY, J.

In his return to the writ of habeas corpus issued in this case, the respondent, William P. Jarrett, sheriff of the City and County of Honolulu, justified under a warrant dated November 22, 1910, issued by a circuit judge of the first circuit commanding the arrest of the petitioner and the production of his body before said judge; and, as a part of an affidavit filed in opposition to a motion for a special direction concerning the custody of the person of the petitioner pending the determina-

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tion of the appeal from an order in the habeas corpus case remanding the prisoner, showed that a commitment had been issued by the circuit judge under date of November 28, 1910, commanding the respondent "to deliver the said Jew Yuen Mow to the High Sheriff of the Territory of Hawaii, or his Deputy, or the Sheriff of the City and County of Honolulu, or his Deputy, who is hereby authorized to commit him, the said Jew Yuen Mow, to the Honolulu Jail to await until the Governor of the State of California shall have the opportunity to issue a requisition to the Governor of the Territory of Hawaii, and the Governor of the Territory of Hawaii order the delivery of the said Jew Yuen Mow to the Governor of the State of California on said charge, but if no such requisition is made for the said Jew Yuen Mow before the 20th day of December A. D. 1910, he, the said Jew Yuen Mow, to be then discharged from Jail."

Upon the appeal the parties argued the question of the validity of the warrant and of the commitment and thereunder the power of a circuit judge in this Territory to command the arrest and cause the detention of persons said to have committed a crime in one of the states of the union and to be fugitives from justice,—this in aid of extradition proceedings to be subsequently had under the provisions of the constitution and of the act of congress relating to the subject, but in view of the circumstances about to be stated we deem it unnecessary to determine these questions.

The respondent has formally suggested of record that the governor of the State of California, on a date not named but obviously prior to December 2, 1910, issued a requisition to the governor of the Territory of Hawaii for the delivery of the petitioner into the custody of an agent of the State of California; that on December 2, 1910, the governor of Hawaii signed an order addressed to the high sheriff of the Territory of Hawaii or his deputy, the sheriff, or his deputy, of the City and County of Honolulu, commanding the arrest of the peti-

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tioner and the delivery of him into the custody of the agent of the State of California conformably to the request of the governor of California; that the order was delivered by the governor to the agent of the State of California for the purpose of being delivered to one of the officers to whom it is addressed for execution; that the agent of the State of California has withheld delivery of the order for execution solely because of the pendency of this appeal and in order to avoid the possibility of the commission of any act which might be deemed a contempt of this court; that the agent of the State of California was at the time of the hearing in this court in attendance upon it and prepared to deliver the order for service immediately upon its becoming appropriate for him to do so; and that the deputy sheriff of the city and county of Honolulu was likewise in attendance and prepared to receive and to execute the order.

The commitment has served its purpose. The events there named, that is to say, the opportunity to the governor of California to issue a requisition and the issuance of an order by the governor of Hawaii have both happened. The service of the order simply awaits the termination of these proceedings in order to avoid any possible question of contempt. Under these circumstances neither the warrant nor the commitment longer justifies the detention of the petitioner and that, too, assuming that both were validly issued.

For these reasons the petitioner was at the close of the oral argument ordered discharged.

C. H. McBride for petitioner.

F. W. Milverton, Deputy City and County Attorney, for respondent.

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JOHN C. LANE v. JOSEPH J. FERN.

ELECTION CONTEST.

ARGUED DECEMBER 9, 1910.

DECIDED DECEMBER 10, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF HARTWELL, C.J.

ELECTIONS—what constitutes a "decision" by inspectors.

The mere acceptance and the counting of ballots unlawfully exhibited by voters constitute "decisions" within the meaning of Sections 56 and 57 of Act 118, L. 1907, irrespective of whether the exhibiting was seen by or known to the inspectors prior to the acceptance or counting.

ELECTIONS—exhibited ballots.

In order to render, under R. L., Sections 87 and 88, an exhibited ballot invalid, it is requisite that the ballot be exhibited wilfully to another after it has been marked and that the person to whom it is exhibited see its contents so as to be informed thereby for whom it is cast.

OPINION OF THE COURT BY PERRY, J.

A demurrer to the petition as originally filed in this case was sustained. Ante p. 290. Subsequently the petitioner amended his petition by adding a paragraph, the substance of which is contained in the following extract: "And your petitioner alleges and charges that on the 8th day of November A. D. 1910 between the hours of 8 A. M. and 5 o'clock P. M. and 6:30 o'clock P. M. at said election booth in the sixth precinct of the Fourth District more than one hundred ballots were openly and wilfully and carelessly exhibited by the electors entitled to vote and who did vote for the duly nominated candidates for the said office of Mayor of the City and County of Honolulu in said polling booth and that the inspectors of election stationed therein and who received, deposited and counted said ballots, well knew that they were so exhibited before receiving them and depositing them in the ballot box and counting them." The respond-

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ent demurs (orally, by consent) to the petition as amended on the ground that it does not set forth (1) "that said one hundred ballots, or any ballots at all, were seen by any persons other than by those who cast the same," (2) that the ballots "were so exhibited after the same had been marked," (3) that the ballots "were so exhibited as to enable the persons to whom they were alleged to have been exhibited to see for whom said votes were cast" and (4) "that the inspectors of election * * * knew that said alleged exhibited ballots had been seen by persons other than those casting the same and had been exhibited wilfully by the voters."

R. L., Secs. 87 and 88, provide that "No voter shall exhibit his ballot to any person, nor shall any person look at or ask to see the contents of the ballot of any voter, except as provided in section 89" and that "if any person * * * shall wilfully exhibit his ballot except as provided in section 89, after the same shall have been marked, he shall thereby forfeit his right to vote." In the opinion on the first demurrer it was held specifically, on this subject, that in order to invalidate a ballot not only must the exhibiting be done wilfully but "the exhibited vote must have been seen by another, a vote not being exhibited within the meaning of the law which is merely held so that another can see who does not in fact see." It is clear that both the statute and the former opinion refer to a "ballot" or a "vote" which has been marked by the voter so as to designate his choice of candidates. The blank forms of ballots handed to voters by the inspectors do not become ballots within the meaning of these provisions of sections 87 and 88 until they have been marked. While the paper still remains a blank the reasons for secrecy do not apply.

"The mere allegation of the amendment that the ballots "were openly and wilfully and carelessly exhibited" is not sufficient to meet these requirements. It is at least ambiguous and uncertain. There is no allegation that the exhibiting of the ballots was after they had been marked or that others saw

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the exhibited ballots and the crosses and words thereon so as to be informed thereby for whom the votes so exhibited were cast. Whether it is necessary to allege and prove in such a case as this that the inspectors knew of the exhibiting prior to their acceptance or counting of the ballots was not decided on the first demurrer, but the reasoning contained in the former opinion on the subject of the "questions" and of the "decisions" contemplated by the election statutes,—that reasoning need not be now repeated—logically requires the conclusion that such an allegation is not necessary. If improper markings, though not observed at the time by the inspectors, are proper subjects for "decision" by the inspectors, and therefore of review on a contest in this court, the same must be true of the exhibiting of votes. It would be impracticable in the latter case, as well as in the former, to enter into an investigation in each particular case on the question of whether or not the facts causing the alleged invalidity were actually observed by the inspectors. The same objections of possible loss of memory by the inspectors and of the facts referred to having been observed by one or two only of the inspectors and not by the others apply in the one case as well as in the other. It is the duty of the inspectors to be on the alert to detect any unlawful exhibiting as also it is their duty to detect improper markings. They must be presumed to have done their duty and to declare, when they accept and count a ballot, that none of the facts constituting invalidity exist. In each instance the mere acceptance and counting is a "decision" irrespective of whether they observe the improper markings or the exhibiting.

On the first, second and third grounds the demurrer is sustained.

G. A. Davis, A. F. Judd, R. W. Breckons and G. S. Curry for petitioner.

W. W. Thayer and C. W. Ashford for respondent.

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ANDREW I. BRIGHT, CHARLES M. COSTER, ARTHUR R. FITZSIMMONS, KAWAI K. GEORGE, JOHN KAAUA, JOSEPH LUAHIWA, CHARLES LAKE, ABRAHAM PAANIANI, NAPOLEON K. PUKUI, JOSEPH PAAHAO, JOHN STONE, JOHN H. OLIVEIRA, CHAS. PAPAIKU, BENJAMIN KAHALOA, JOHN KAILIANU, JOHN K. AYLETT, WILLIAM KAHELUEKAHI, WILLIAM KALEHUA, LYNCH KEKAHUNA, HENRY K. HAOLE, JOHN KALAMA, MANUEL E. LEE, L. M. S. KEAUNUI, GEORGE P. P. KANAKANUI, JOHN M. KEALOHA, JOHN POAI, WM. L. AUSTIN, JOHN MAHIAI, J. N. HELELOA, LEVI K. KAELEPULU AND MANUEL DE MELLO *v.* JOSEPH J. FERN.

ELECTION CONTEST.

HEARD DECEMBER 14, 15, 1910.

DECIDED DECEMBER 16, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF HARTWELL, C.J.

ELECTIONS—withdrawal of petitioners—effect of.

In an election contest brought by thirty voters under Section 56 of Act 118, L. 1907, any one or more of the petitioners may withdraw as such, at least before answer filed and with leave of the court, subject only to an appropriate order as to costs. In that event the contest may not be maintained by the remaining petitioners.

Id—amendment—parties plaintiff.

After the expiration of the time limited by statute for the bringing of election contests a petition by thirty voters, one or more of whom have discontinued, may not be amended by adding the names of new parties plaintiff.

OPINION OF THE COURT BY PERRY, J.

(De Bolt, J., dissenting in part.)

This is a petition praying that the election of respondent as mayor of the City and County of Honolulu be set aside and that John C. Lane be declared elected to that office. It was filed on December 7, 1910, and was signed by and brought in

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the name of thirty-one alleged duly qualified voters of the sixth precinct of the fourth election district of this Territory. On December 14, before an answer filed, two of the voters who signed the petition, appearing in person, in open court expressed a desire to withdraw as petitioners and to have the proceedings discontinued as far as it lies in their power to do so. Respondent thereupon moved to dismiss the petition for failure of parties plaintiff.

This is an adversary proceeding. While the public may to some extent have an interest in it, it has not control of it so as to prevent any or all of the petitioners from withdrawing from the contest. The public is not a party. The ordinary rules as to the control of petitioners over their own case apply in this respect. Before issue joined any one or more of the parties plaintiff may withdraw subject to such order as may be made concerning costs and, perhaps, to certain other limitations which do not apply in the case at bar. If leave to discontinue is ordinarily requisite at this stage no reason occurs to us for withholding it. The presumption is that the election was validly conducted and the court should not place itself in the position of encouraging litigation by compelling the continuance of the contest against the will of the petitioners.

The withdrawal of two of the petitioners requires the dismissal of the petition. While the language of Section 57, Act 118, L. 1907, is that any thirty voters may "file a petition," the statute contemplates, we think, that thirty voters are requisite not only to the institution but also to the continuance of the proceeding. The intent of the legislature evidently was that no contest should be permitted unless (aside from action by the defeated candidate himself) thirty voters could be found who agreed that a contest would be justified by the facts and necessary or desirable. If any of the thirty, at least before answer, lose faith in their petition or for any reason alter their views as to the desirability of further litigation, the contest becomes that of the remainder only. If one of the thirty may withdraw

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and still leave vitality in the proceeding, twenty-nine may withdraw with the same result. We are unable to conclude that the legislature contemplated the continuance by one voter, or by ten or by any number less than thirty, of a contest, even though properly instituted by the required number.

After oral announcement of this ruling, a motion was made to amend the petition by adding the names of five other voters as parties plaintiff, reliance being had in that connection upon R. L., §1738, relating to amendments of pleadings and process. That statute in its provision permitting the amendment of any petition "by adding * * * the name of any party" contemplated that there should be remaining in the case before the amendment a party to add to,—something to amend by. In this case there is no plaintiff to add to. The statute of 1907 creates for cases of this nature a unit, to wit, thirty voters, to serve as a party plaintiff. As already held, that unit has been destroyed by the withdrawal of the two petitioners. It no longer exists and there is nothing to amend by. With the discontinuance by the two the court lost jurisdiction in the matter save in the respect above stated. This is not a case of ordinary co-plaintiffs in which the rights of those remaining may survive the withdrawal of other co-plaintiffs.

The motion for leave to amend is denied and the petition is dismissed.

G. A. Davis, A. F. Judd, R. W. Breckons and G. S. Curry for petitioners.

W. W. Thayer and C. W. Ashford for respondent.

DISSENTING OPINION OF DE BOLT, J.

I am unable to concur in the opinion of the majority that "the withdrawal of two of the (31) petitioners requires the dismissal of the petition."

As I view this matter the filing of the petition by "any thirty duly qualified voters of any election district" is essential, only, to give the court jurisdiction—power to proceed in the

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hearing of the contest—and that it does not lie in the power of any one of the thirty petitioners to oust the court of the jurisdiction thus acquired, by his withdrawal. If the opinion of the majority is sound, then, also, by the death, insanity, conviction of felony, or removal from the election district, of any one of thirty petitioners, after filing the petition, would, *ipso facto*, operate as a dismissal of the petition and oust the court of its jurisdiction. I cannot believe that the legislature intended, or that the statute contemplates, any such condition of affairs, or that the rights of honest voters should be so precariously placed in the keeping and held at the pleasure, or mere whim, of a possible corrupt, ignorant or weak man, simply because he happens to be one of the thirty petitioners.

Whatever may be said as to an election contest being an adversary proceeding, it must be conceded, as it seems to me, that there is a marked distinction between a contest instituted by a defeated candidate and one begun by thirty voters. The candidate, in addition to his interest as a citizen and voter, also has a deep personal and pecuniary interest in the matter. The thirty voters as petitioners have no interest save those in common with other citizens and voters. This distinction, to my mind, tends to show that such petitioners owe a duty to the public and to their fellow petitioners which they cannot throw off at will. What other purpose could the legislature have had in the enactment of this statute than to enable thirty voters to subserve the public interest?

The doctrine which recognizes the right and power of a plaintiff in an ordinary suit or action to withdraw or dismiss his cause before issue joined, has no application, as I view it, to an election contest instituted by thirty voters.

The statute (Sec. 57), to my mind, is too plain to admit of construction. Its language and requirements are clear and explicit. It reads as follows:

“Any candidate directly interested, or any thirty duly qualified voters of any Election District may file a petition in the

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Supreme Court of the Territory setting forth any cause or causes why the decision of any Board of Inspectors should be reversed, corrected or changed."

It will be observed that each and every sentence, phrase and word contained in this statute are necessarily employed in expressing and prescribing the appropriate steps to be taken and the essential requisites to be complied with in order that the jurisdiction of the court may be invoked for the purposes therein mentioned. Not a single word remains to express an additional thought, or upon which any possible construction can be placed. Nor does the statute purport to cover or apply to any part of the proceedings subsequent to the filing of the petition. To provide for the filing of the petition is the sole purpose of the statute. Had the legislature intended to place in the hands of one of the petitioners the power to dismiss the proceedings it could have easily done so in appropriate words.

There appears to be a dearth of authorities on the point under consideration, but I believe the following citations will be found to support my view: *McCrary on Elections*, Sec. 454; *People v. Holden*, 28 Cal. 124; *Searcy v. Grow*, 15 Cal. 118; 15 Cyc. 402, 416; 7 Ency. P. & P. 393, 394; 6 Ency. P. & P. 853, 854, 871; 14 Cyc. 394, 399; 30 Cyc. 138, 139; *Hirshfeld v. Fitzgerald*, 46 L. R. A. 839; *Coghlan v. Alpers*, 140 Cal. 648; *Sweeny v. Adams*, 141 Cal. 558; *In re Cole's Election*, 72 Atl. 510.

Following the oral ruling of the court on the foregoing question counsel then moved to amend the petition by adding the names of five other voters as parties plaintiff. I concur in the ruling of the court on this motion.

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WILLIAM O. SMITH, SAMUEL M. DAMON, E. FAX-
ON BISHOP, ALBERT F. JUDD AND ALFRED W.
CARTER, TRUSTEES UNDER THE WILL OF
BERNICE PAUAHI BISHOP, DECEASED, v.
ALEXANDER LINDSAY, JR., ATTORNEY GEN-
ERAL OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED DECEMBER 8, 1910.

DECIDED DECEMBER 19, 1910.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE WHITNEY IN
PLACE OF HARTWELL, C.J.

WILLS—construction.

In the will of Bernice Pauahi Bishop the direction to the trustees "to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances" refers to support and education at the Kamehameha Schools only and not to support independently of education.

OPINION OF THE COURT BY PERRY, J.

This is a bill by the trustees under the will of Bernice Pauahi Bishop, deceased, for a construction of the will. The respondent appeals from the decree of a circuit judge. After giving to certain individuals life estates in various parcels of land and making other specific bequests, the testatrix, in paragraph thirteen, makes the following provisions: "I give, devise and bequeath all of the rest, residue and remainder of my estates real and personal, wherever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed however one-half of the fund which may come into their hands, in the purchase of suitable premises, the erection of school buildings and

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in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my trustees to invest the remainder of my estate in such manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers, the repairing of buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure and part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees, they to have full discretion. I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women, and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees. I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer of this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some newspaper published in said Honolulu; I also direct my said trustees to keep said school buildings insured in good companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the

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teachers of said scholars shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants." The remainder of the will relates to the appointment and powers of the trustees and to other specific bequests. Of the two codicils no portion is claimed to throw light on the questions involved in this case save paragraph four of the second, reading as follows: "Of the two schools mentioned in the thirteenth article of my said will, I direct that the school for boys shall be well established and in efficient operation before any money is expended or anything is undertaken on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their opinion from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen into the general fund. I also direct that my said trustees shall have power to determine to what extent said schools shall be industrial, mechanical, or agricultural; and also to determine if tuition shall be charged in any case." The prayer of the bill is that the trustees be instructed "whether the direction in the thirteenth clause of said will 'to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood' should be construed as referring to such support and education as can properly be given in connection with the Kamehameha Schools in said thirteenth clause referred to or whether said direction should be construed to mean the support and education of such persons elsewhere than at said schools and whether in any case support can be given independently of education."

The first sentence of paragraph thirteen, standing by itself, is free from ambiguity. The whole of the residue is given to trustees and the trust is clearly expressed to be the establish-

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ment and maintenance of the two Kamehameha schools. Is there anything in the remainder of the paragraph inconsistent with this provision? We think not. The remainder consists merely of more specific directions for the accomplishment of the object already expressed. First the trustees are directed to expend not exceeding one-half of the principal for the acquirement of the initial equipment, including lands, buildings, furniture and apparatus, then they are directed to invest the unexpended portion of the principal and to expend the annual income of that portion in the maintenance of the schools. These two provisions supplement each other and, if carried out, furnish a complete school in operation. To avoid possible doubts, however, the testatrix proceeds to specify what she means when she speaks of the "maintenance" of the schools and defines that term as including the salaries of teachers, repairs of buildings, incidentals, and aid to indigent pupils to enable them to attend. Discretion is then given to the trustees to apportion this annual income among these "various objects" or items of maintenance. The scheme of charity through the medium of these two schools is complete. Its various parts fit well each with the other. There is no inconsistency. All of the other provisions of the paragraph relate to these schools. Why not this provision also? The particular words under consideration "and devote a portion of each year's income to the support and education of orphans and others in indigent circumstances" are easily capable of the construction that they relate to support and education at these schools. This provision is closely associated with the others of the paragraph, all of which relate to the one subject. Grammatically, by merely substituting a colon for the semicolon after the words "maintenance of said schools," all vestige of doubt of the correctness of this construction would disappear. From the point of view of the testatrix this provision for indigent orphans and others would be highly desirable, even if not indispensable, to complete the effectuation of her main charitable object. Necessary to a successful school

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are not only initial equipment, repairs of that equipment, incidentals and teachers, but also pupils, and if it was the wish of the testatrix to extend the benefits of her schools to the indigent young this would be the natural and appropriate method of accomplishing that purpose and expressing that object. The argument that if it had been the intention of the testatrix to afford the support and education in question at the schools she would not have spoken of expending or dividing the income does not appeal to us. Free support and education cannot be furnished, even in her own schools, without the expenditure of income or other moneys.

The construction contended for by the respondent that the support and education contemplated was to be furnished elsewhere than at the schools and that support can be furnished independently of education would require undue straining of the language used. Ordinarily it would be expected that such a broad additional method of dispensing charity, so radically different from that provided for in the remainder of the paragraph, would be treated of in a separate provision with at least a few specific directions and limitations as to the duties of the trustees in that regard. Such a subject would scarcely be attempted to be covered by an insignificant sentence or part of a sentence in the middle of a lengthy paragraph, all other provisions of which are descriptive of the powers and duties of the trustees relating to the schools. In the paragraph under consideration power is given to the trustees to make rules and regulations for the government of the schools and to alter the same, and it is directed that they report annually to a judicial tribunal concerning the condition of the schools and that the teachers shall forever be persons of a stated religion. No similar directions or limitations are made concerning the other important charity claimed by the respondent to be provided for.

The grant of power to the trustees in paragraph four of the second codicil "to determine if tuition shall be charged in any case" is not, in our opinion, inconsistent with the provisions

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of paragraph thirteen as we construe them. There is nothing in paragraph thirteen to indicate that either tuition or board and lodging at the schools shall be free save in the instances provided for concerning indigent orphans and others. By the second codicil it was apparently the desire of the testatrix to extend the power of the trustees relating to tuition, and while it may be that she could appropriately have expressed this as a power to determine "if tuition shall be free in any case" she could, with equal propriety, authorize the trustees to determine, as she did, "if tuition shall be charged in any case." Each method of expression would occur as readily to the ordinary mind as the other.

In our opinion the clause under consideration refers to support and education at the Kamehameha Schools only and not to support independently of education. The decree appealed from is affirmed.

S. M. Ballou (*Kinney, Ballou, Prosser & Anderson* on the brief) for plaintiffs.

W. L. Stanley (*Holmes, Stanley & Olson* on the brief) for defendant.

MARY A. RICHARDS *v.* CARL ONTAI, HENRY ONTAI
AND JAMES ONTAI, DOING BUSINESS UNDER
THE NAME OF ONTAI BROTHERS.

SUBMISSION UPON AGREED FACTS.

ARGUED DECEMBER 17, 1910.

DECIDED DECEMBER 29, 1910,

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

LANDLORD AND TENANT—*liability for sewer rates.*

Under a lease the lessor agreed to pay "the taxes levied" on and the lessees "all other charges" of the demised premises. Held, that sewer rates are payable by the lessees.

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ACTIONS—*splitting of.*

Judgment in an action of assumpsit for instalments of rent under a lease bars an action for the amount of sewer rates which accrued during the same period and which the lessees by the same instrument obligated themselves absolutely to pay. The right of action in such a case is single and indivisible.

LANDLORD AND TENANT—*construction of lease.*

An agreement by lessees to "supply" to the lessor "free of charge all water required for buildings and grounds expressly reserved under this lease," construed, under the circumstances of the case, to require the lessees to pump water sufficient for the buildings in the same manner that it was being furnished at the date of the execution of the lease.

CONTRACTS—*assignability.*

The lessees' rights under a letter quoted in the opinion held to be non-assignable.

OPINION OF THE COURT BY PERRY, J.

This is a submission under R. L., Sec. 1748, upon an agreed statement of facts. On January 21, 1907, the plaintiff as lessor and the defendants as lessees executed a lease of certain property known as the Kauluwela Lodgings for a term of fifteen years at a rental of \$1500 per year payable quarterly. The demised property was at that time and ever since has been connected with the government sewer system. The sewer rates, with penalties and interest which have accrued since the date of the lease, remain wholly unpaid. The lease provides, *inter alia*, as follows: "It is further agreed * * * that the lessor * * * shall * * * pay the taxes levied on said premises without recourse to" the lessees. "And it is further * * * agreed * * * that the lessees shall pay all other charges of the hereby leased premises and meet all requirements of the board of health at their own cost and expense."

The first question submitted is whether the lessor or the lessees are liable under the terms of the lease to pay the sewer rates. In our opinion the liability is upon the lessees. Sewer rates are not taxes within the ordinary meaning of the term and are not usually understood to be taxes. "Taxes are the

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enforced proportional contributions from persons and property levied by the State by virtue of its sovereignty for the support of government and for all public needs." Hamilton, Special Assessments, Sec. 36. They are levied irrespective of whether or not the persons or the property assessed receive any special benefit or consideration for the levy. Whatever may be said of the fact that under our laws and under the rules and regulations of the board of health an occupant of a city lot, using it for certain purposes, may not dispose of the sewerage into a cesspool upon his premises, connection with the sewer and payment of the resulting rates are, nevertheless, usually regarded as voluntary. The rates need not be paid unless the property owner or occupant requests that his premises be connected with the public sewer. The payment of rates is in consideration of the special use and benefit which the owner derives from the public property. In undertaking to pay "taxes" the lessor, therefore, did not undertake to pay for sewer rates. The term "other charges," on the other hand, is sufficiently broad to include expenditures for the use of the sewer as well as expenditures for other purposes which are a burden upon the demised property. The intention of the parties is evident that the lessor was to bear the taxes and that all other expenses of the property were to be met by the lessees.

On April 22, 1908, the lessor brought an action of assumpsit against the lessees for \$625, being a balance of rent due under the lease from January 3 to July 3, 1908, and recovered judgment. The second question is whether that judgment is a bar to the recovery by the plaintiff of that part of the sewer rates now in controversy which accrued prior to the date of the institution of the action, the defendants contending that the claims for rent and for the amount of the sewer rates constitute a single, indivisible cause of action and the plaintiff that they are separate causes of action and that the right of action for the sewer rates had not accrued in April, 1908, because plaintiff had not at that time paid the rates to the Territory.

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“While the general principle is undeniable that a former judgment on the same cause of action bars a second action between the same parties, it is not always easy to determine when the causes of action are identical or what is to be deemed a single or entire demand within the authorities” against splitting. *Perry v. Dickerson*, 85 N. Y. 345, 348. In the case at bar the lessees’ promise was, not to indemnify the lessor in the event of the latter being compelled to pay the rates, but to pay them in any event. The undertaking was absolute to make the lessor’s debt that of the lessees and the duty was to pay the rates when under the law they became due and payable to the Territory. Under these circumstances a right of action accrued in favor of the lessor upon the lessees’ failure to pay at the appointed time and that, too, without any prior payment by the lessor to the Territory. The payments agreed to be made for sewer rates and expenditures caused in compliance with board of health regulations, like similar payments for taxes, are in the nature of rent for the use of the demised premises. Upon the lessees’ failure to pay each instalment, it becomes at once a debt by them to the lessor, recoverable in the same manner as the monthly or annual instalments of rent reserved under that name. The mere fact that the amounts of the sewer rates or other charges are not ascertained at the date of the lease does not alter the principle. That is certain which can be made certain. Nor is the rule rendered inapplicable by the fact that under our statute the occupant or lessee is liable to the Territory jointly and severally with the owner. (R. L., Sec. 1038.) The parties must be presumed to have been aware of this provision when they executed the lease. Their contract was absolute and unqualified that the lessees should pay the rates and their object obviously was to protect the lessor and her property from the liability and the lien imposed by the law. The lessees’ statutory liability to the Territory was to their minds immaterial.

On the subject of the promisee’s right of action against the

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promisor immediately on the latter's failure to perform an absolute promise to pay a debt due by the former, without requiring prior payment by the promisee, the authorities are, as far as we are aware, in entire accord. "Upon the lessee's neglect to pay" (taxes as provided in a covenant in the lease), "a cause of action at once accrues to the lessor, and he may either pay the tax and sue the lessee for the amount, or may sue without first so paying it himself."—1 Taylor, L. & T., Sec. 399.

"It is urged that the plaintiff cannot recover because she has not paid the assessments. The claim is made relying on the rule, as to principal and surety, that a surety has no right of action against his principal in respect to a debt for which he is surety until he has paid the debt for his principal. A different rule is applicable here; that, wherein one party agrees not to be surety for, but to absolutely pay the debt of, another, so that, as between the two, such party is primarily liable. We said in *Stout v. Folger*, 34 Iowa, 71, that 'the authorities agree that, upon an undertaking to pay a debt due a third person, the plaintiff may maintain an action without showing that he has paid the debt.'"—*Vorse v. Marble Co.*, 104 Ia. 541, 545, 546.

"Nor is it necessary that the plaintiff should pay the tax to the city to entitle her to maintain this action. The promise is not one of indemnity against the tax, but a promise to pay it."—*Richardson v. Gordon*, 188 Mass. 279, 281.

"The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will then pay them. It is his own debt, made so by the terms of his covenant."—*Trinity Church v. Higgins*, 48 N. Y. 532, 535-538.

See also 24 Cyc. 1079, 1080; *Fontaine v. Lumber Co.*, 109 Mo. 55, 59, 60 (18 S. W. 1147, 1148); *Port v. Jackson*, 17 Johns. 238, 244, 246; *Ham v. Hill*, 29 Mo. 275, 278, 279; *Stout v. Folger*, 34 Ia. 71, 74, 75; *Hand v. Suravitz*, 148 Pa. St. 202, 207, 208; and *Broadwell v. Banks*, 134 Fed. 470.

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The lessor, then, had, at the date of the commencement of the action for the other portion of the rent, a right of action against the lessees for the amount of the sewer rates then due. The claim for the rent reserved in specified instalments and that for the amount of the rates constituted one indivisible demand or cause of action. The parties were the same, both claims arose out of the same contract and both sums were parts of the same rental or consideration for the use of the land. A lessor is not in such a case at liberty to split his claim and to sue for one part of the rent in one action and another part in another action. The former judgment would bar the plaintiff from recovering these rates of the defendants in a new action. This answers the second question submitted. Whether or not the lessees, in the event of their being compelled to pay to the Territory that portion of the rates which accrued prior to the action of assumpsit, could, in the face of their specific covenant, recover of the lessor the amount so paid by them is a question which has not been argued and which does not arise under the terms of the submission.

At the date of the lease there was an artesian well on the vacant lot known as the "park" and by the terms of the lease excepted from its operation. The method at that time of furnishing water to the excepted buildings and other property was by pumping with a gasoline engine from the well into an elevated tank about thirty feet high on the leased premises, the water flowing from the tank by gravity to the points where required; and into a swimming tank reserved from the operation of the lease water flowed directly from the well. On October 7, 1907, the plaintiff leased to one Steere certain premises adjoining the lot known as the "park," and as a part of the same transaction the defendants entered into a verbal agreement with Steere to furnish him water from the well for certain laundries which he proposed to erect on the land demised to him, at a stated rental. Subsequently, the defendants asking a higher rental of Steere than that agreed upon, the plaintiff urged

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upon them the execution of a lease at the agreed rate and thereafter the lease was signed. The third question is whether under the lease the defendants are under obligation to pump the water required for the reserved buildings or simply to permit the lessor to take the water as it stands in the well.

The provisions of the lease relating to water are as follows: "And it is further understood and agreed that" the lessees "shall have the right into and the sole ownership excepting as inhibited by the provisions of this lease, of all of the water upon said premises and said" lessees "can dispose of said water either by sale thereof if they so desire within the term of this lease, so that no injuries shall accrue to the premises or its water rights, nor can this water privilege of water rights be sold, transgressed or assigned to any other parties or persons or corporations or copartnership without the written consent of" the lessor. "And it is further understood and agreed that all and any sums of money that comes from the sale of water shall be the sole property of" the lessees, and said lessees "shall have the right of way for laying pipes through that part of the premises known as the park without let or hindrance, they not committing waste in the laying of said pipes and to sell said water excepting that reserve herein, when and to whom they please. * * * It is agreed moreover that" the lessees "shall supply to" the lessor "free of charge all water required for buildings and grounds expressly reserved under this lease." In *Richards v. Ontai*, 19 Haw. 451, it was held, construing this lease, that "the grant to the lessee includes all of the flow of an artesian well on the excepted premises other than water sufficient for the excepted buildings and grounds in the condition in which they were at the date of the lease," but the precise question as to the lessees' duty to pump was not then before the court. As stated in the former opinion, "The parties are presumed to have made their contract with reference to conditions as they existed at the time." *Id.* 455. It is to be noted that the provision in favor of the lessor is not merely a

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reservation of water sufficient for the purposes stated. It goes farther. The specific agreement is that the lessees shall *supply* to the lessor *free of charge* all water required for the reserved *buildings* and grounds. It was clearly contemplated by the parties that the water referred to in this agreement was to be used in the *buildings* named as well as on the grounds. To the swimming tank it could flow by gravity, as it was then flowing, but as to the buildings it was obviously not the intention that the water should be furnished at the property line or at any other point where it would be useless. It was the intention, as we read the lease, that without cost to the lessor the lessees should furnish the water for the buildings in the manner in which it was then being furnished, that is to say, in an elevated tank whence it could flow by gravity to the desired portions of the buildings. Nor is the lessor estopped to make her present claim in this respect by the part which she took in obtaining the execution of the lease from the defendants to Steere. In that lease it was expressly provided that "The lessors hereby reserves and excepts from the operation of this lease the right to take and use so much of the water from said artesian well as can flow through the pipes which they have already connected therewith; also the right to pump such water from said well as they may be able to pump with the pump now connected therewith or by any other pump of similar capacity," also water for said other purposes "and also the right to lease all surplus water." The reserved right to pump protected the interests of the present plaintiff.

The lease included an agreement "that the building containing Hale Aloha is reserved for charitable purposes and any rental of any part of this building for money consideration shall be subject to agreement between parties for the first and second part." On December 11, 1907, the plaintiff leased to one Yong Kee a part of the buildings known as Hale Aloha, and on December 28, 1907, wrote to the lessees: "I am having signed a lease to Yong Kee which you will have to sign in

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view of the provisions in my lease to yourself and brothers. In view of the foregoing and in further view of your collecting rents from Yong Kee and other tenants of the building I am putting in your charge this building with the right to let rooms above the stores in accordance with an understanding with me, as to price, etc., and to collect all rents of the building with the understanding that as long as you do this and as long as you continue to be a tenant of Mary A. Richards and hold the Kau-luwela Lodgings, that you will share equally in the net proceeds of the building. I will expect to have an accounting at the end of each month and a payment of my part of the income. No changes in the building nor expenses may be incurred without my express permission. I also reserve the right to retain a room for my fireman, and one other should I desire it, due notice of which desire shall be given you." The defendants assented to this lease, apparently in consequence of the offer contained in the letter of December 28. The fourth question is whether or not the right of the lessees to collect rents from Hale Aloha is assignable. In our opinion it is not. In the original lease title to the Hale Aloha was reserved to the lessor, the only control given to the lessees being that the building could not be devoted to commercial purposes without their assent. In consideration of that assent the lessor made the offer contained in her letter, but that instrument merely constituted the Ontais agents of the lessor to let rooms and to collect rents, taking as their compensation for the services rendered one-half of the net proceeds. The authority was personal to the Ontais and is not assignable.

Judgment accordingly.

C. R. Hemenway (Smith, Warren & Hemenway on the brief) for plaintiff.

J. A. Magoon (Magoon & Weaver on the brief) for defendants.

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TERRITORY OF HAWAII *v.* FUROMORI, TOMINAGA,
MURAKAMI, TANAKA, FUROKAWA AND YA-
SUOKA.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 22, 1910.

DECIDED JANUARY 4, 1911.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HARTWELL, C.J.

CRIMINAL LAW—*evidence obtained illegally—constitutional rights.*

The admissibility of evidence is not affected by the illegality of the means through which it has been obtained. The admission of such evidence, if obtained without order or sanction of the court, violates no constitutional rights.

STATUTES—*construction.*

In the enactment of sections 3173-3178, R. L., and of Act 44, L. 1909, the legislature intended to include in each section all the elements essential to its individual completeness, and did not contemplate that on a charge for the violation of one section a conviction should be had solely upon evidence of the violation of another section.

NEW TRIAL—*lottery—che fa—proprietor of—player does not assist.*

The defendants were convicted on a charge that they did "assist in maintaining and conducting a certain lottery, to wit, che fa," and the evidence tending to show that one of them was the proprietor and that two assisted, their conviction must be sustained, but as to the other three, the evidence tending to show that they only purchased tickets, were present and played, they did not come within the charge as assisting in the maintenance of the lottery and were wrongfully convicted. New trial granted as to them.

APPEAL AND ERROR—*instruction—ambiguous and misleading.*

Even though an instruction is ambiguous and misleading, the mere saving of an exception to it without request for further instructions, presents no error on appeal.

OPINION BY THE COURT BY DE BOLT, J.

The defendants having been tried, convicted and sentenced on a charge that they did "assist in maintaining and conducting a certain lottery, to-wit: che fa," bring the case here on exceptions.

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The record before us shows that at the time and place of the arrest of the defendants, the officers, without a search warrant, broke the door to the room in which the defendants were, entered, placed the defendants under arrest, seized and carried away a counting board, some che fa tickets, a tin box with a name in it and a book containing rules of the game of che fa, all of which, at the trial, were offered in evidence by the prosecution and admitted by the court over the objection of the defendants.

The defendants contend that this evidence was inadmissible because illegally obtained, and that its admission was erroneous. We held in *Territory v. Soga et al.*, ante, pp. 71, 82, that certain papers taken from the office of one of the defendants in that case without process of law and forcibly, were properly admitted in evidence, and we know of no reason why we should rule otherwise in this case.

It is the established rule that the admissibility of evidence is not affected by the illegality of the means through which it has been obtained. The admission of such evidence, if obtained without order or sanction of court, violates no constitutional rights. It is not in accord with the orderly administration of justice for a court, while engaged in the trial of a cause properly before it, to turn aside and determine another distinct matter, which it would be obliged to do on every occasion a question like this should arise, if the rule referred to is not to be observed. The evidence was properly admitted. See 3 Wigmore on Ev., §§2183, 2264; 1 Greenleaf on Ev., §254a; Gillett, Indirect and Collateral Ev., §87; *Adams v. New York*, 192 U. S. 585.

The prosecution having rested, the defendants, Tominaga, Tanaka, Yasuoka and Furomori moved the court that they be discharged on the ground that the evidence failed to show that they were guilty of the offense of maintaining or conducting, or of assisting in maintaining or conducting, a lottery as charged.

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The question thus presented involves the construction of sections 3173-3178, R. L., and of Act 44, L. 1909. It will be observed that each of these sections, when read in connection with section 3179, R. L., which relates to the penalty, is a complete statute, separate and distinct from any other section. With this idea in mind, that the various sections are independent of each other, it may also be well to observe that each section, after enumerating certain prohibited acts, declares that every person who violates its provisions shall be "guilty of a misdemeanor."

Sections 3173-3179, R. L., read as follows:

"Sec. 3173. Maintaining or assisting, etc. Every person who contrives, prepares, sets up, draws, maintains or conducts, or assists in maintaining or conducting any lottery is guilty of a misdemeanor.

"Sec. 3174. Selling tickets, etc. Every person who sells or buys, gives or receives, has in possession or in any manner whatever deals with any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor.

"Sec. 3175. Playing prohibited games. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts either as owner or employee, whether for hire or not, any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice or any devices for money, checks, credit or any representative of value or of any other game in which money or anything of value is lost or won, and every person who plays or bets at or against any such prohibited game or games, and every person present where such game or games are being played or carried on, is guilty of a misdemeanor.

"Sec. 3176. Bunco games. Every person who by the game of 'three card monte,' 'shell game' or any other game, device, sleight of hand, pretention to fortune telling, trick or other means whatever by use of cards or other implements or instruments, or while betting on sides or hands of any such play or

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game, fraudulently obtains from another person money or anything of value is guilty of a misdemeanor.

"Sec. 3177. Betting. Every person who bets or gambles upon any horse race, boat race, ball game, bicycle race or any athletic game, sport or contest, in any manner whatsoever, either by risking money or any other thing of value, is guilty of a misdemeanor.

"Sec. 3178. Using vessels, buildings, for gambling. Every person who lets or permits to be used any building or vessel or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, chance, share or interest in or depending upon the event of any lottery or who knowingly permits any game or games prohibited by sections 3172-3182 to be played, conducted or dealt in any building or vessel owned or rented by such person in whole or in part, is guilty of a misdemeanor.

"Sec. 3179. Penalty. Every person guilty of a misdemeanor as provided in sections 3172-3182, shall be punishable by a fine of not more than one thousand dollars, or imprisonment at hard labor not exceeding one year."

Act 44, L. 1909, reads as follows:

"Section 3175A. Every person who shall exhibit or expose to view in any room, house or place barred or barricaded or otherwise built or protected in a manner to make it difficult of access or ingress to Police Officers, where three or more persons are present, any cards, dice, dominoes, or any gambling table layout, or any part of such layout, or any other gambling implements whatsoever used in any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice, dominoes, or any device for money, checks, credit or any representative of value, or any other game, in which money or anything of value is lost or won, is guilty of a misdemeanor.

"Section 3175B. Every person found present in any such room, house, or place barred or barricaded, or otherwise built or protected in a manner to make it difficult of access or ingress to Police Officers where are exhibited or exposed to view any cards, dice, dominoes, or any gambling layout, or any part of such layout or any other gambling implements whatsoever used

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in any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game played with cards, dice, dominoes, or any device for money, checks, credit or anything of value is lost or won, is guilty of a misdemeanor."

The legislature obviously intended in the enactment of these statutes to include in each section all the elements essential to its individual completeness, and that the violation of each was a misdemeanor, separate and distinct in every way from the violation of any other section. It is equally obvious that the legislature did not contemplate that on a charge for the violation of one section, a conviction should be had solely upon evidence of the violation of another section. It is fundamental that the accused shall be informed of the nature and cause of the accusation against him. This constitutional safeguard would become a mere mockery if a person charged with the commission of one offense could be convicted by showing a commission of another. And, in this connection, it may be well to observe that the defendants were placed upon trial on a charge that they did "assist in maintaining and conducting a certain lottery, to-wit, che fa," in violation of Sec. 3173.

As to the defendants Murakami and Furokawa there was evidence tending to show that the former conducted the lottery as proprietor, and that the latter assisted by selling tickets, receiving money therefor and turning it in to the proprietor. These two defendants come clearly within the charge and the conviction must be sustained. As to Tominaga, Yasuoka and Furomori the evidence fails to show that they committed any act in violation of Sec. 3173, the statute upon which the charge is based, unless, as the city and county attorney contends, the fact that they purchased che fa tickets, were present and participated in the game as mere players, must be held as constituting the offense of assisting in maintaining and conducting the lottery. Whether these acts on the part of the defendants were in violation of any other section or statute we need not say, but it is clear that such acts were not in violation of Sec.

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3173. The purchaser of a che fa ticket, by his presence and offer to buy, no doubt induces the proprietor of the lottery to make the sale; but he can not be said to "assist" him in it. Their respective motives and purposes are opposed to and in conflict, each with the other. They are antagonistic, and approach the game from opposite standpoints, each striving to win something of value from the other. *State v. Teahan*, 50 Conn. 92, 101; 1 Am. & Eng. Ency. Law, 390. The conviction as to these three defendants must be set aside.

Now as to the defendant Tanaka. So far as regards the purchase of tickets, being present and playing, his position is similar to that of the three last named defendants, but in addition to that, there is some evidence that he assisted in maintaining and conducting the lottery by selling, marking and delivering tickets to other players, collecting the money therefor and turning it over to the proprietor of the lottery. Hence, by reason of this dual position in which some of the evidence seems to have placed this defendant, we are presented with the question, saved by exception, as to the correctness of that portion of the court's charge given of its own motion to the jury, which reads: "I believe under the section (3173) that a player might be found guilty as a principal, provided you find that such player incited and encouraged the maintenance of the lottery itself."

We understand the argument urged against this instruction to be, that it is ambiguous and misleading, and that it is susceptible of and might have been construed by the jury as charging them, that, even though the player did not actually assist in the maintenance of the lottery, nevertheless, they were at liberty to convict him on the theory that merely as a player he assisted, within the meaning of the statute. To so construe the instruction it would be necessary to omit the proviso, which the court apparently intended as an essential part of the instruction. This, we are not at liberty to do. The jury was given to understand by this instruction that before they would be justified in convicting a player they must also find that he

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had done some act in addition to merely playing, which might reasonably be expected, and so intended, to assist in the maintenance of the lottery.

However, even though the instruction is ambiguous, or misleading, and susceptible of the construction which counsel urge that the jury might have placed upon it, still, the mere saving of an exception to it without any request for further instructions, presents no error for us to consider. We must assume, nothing appearing to the contrary, that the jury correctly understood and construed the instruction. See 2 Thompson on Trials, §2431 and 11 Ency. Pl. & Pr. 224.

The conviction of Tanaka must therefore be sustained.

All of the defendants' requested instructions were refused, but they were given in the court's own language, and the only exception taken to those, we have just considered and disposed of.

Exceptions of the defendants Murakami, Furokawa and Tanaka are overruled; those of the defendants Tominaga, Yasuoka and Furomori are sustained for the reasons stated in this opinion, the verdict and judgment against them are set aside and vacated and a new trial granted as to them.

J. W. Cathcart, City and County Attorney (F. W. Milverton, Deputy City and County Attorney, with him on the brief), for the Territory.

Lorrin Andrews and Eugene Murphy for defendants.

ANE KAEHU v. MEEAU NAMEALOA.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED JANUARY 4, 1911.

DECIDED JANUARY 5, 1911.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

EXCEPTIONS, BILL OF—*sufficiency*.

The mere statement in a bill of exceptions that "the court

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filed its decision in said action, to which the plaintiff duly excepted," is not sufficient to bring to this court any question or error for review.

OPINION OF THE COURT BY DE BOLT, J.

This was an action of ejectment instituted in the circuit court of the second circuit to recover certain land, and upon issue being joined, the cause was tried by the court, jury waived, the decision being that the plaintiff take nothing.

Thereupon the plaintiff filed a bill of exceptions, the only exceptions being: "That * * * the Court filed its decision in said action, to which the plaintiff duly excepted" and that plaintiff's motion to allow an amended complaint was denied, "to which the plaintiff, at the time, duly excepted."

The cause now comes before us on a motion by the defendant to dismiss the bill of exceptions on the ground that the exceptions taken are too general and too vague for consideration and do not specify any errors.

At the hearing on this motion the matter was submitted on the exception to the decision of the trial court, the exception to the denial of the motion for leave to file an amended complaint being waived.

The exception relied upon fails, absolutely, to point out any error whatsoever. It does not appear, even by inference, or at all, whether the exception was saved on the ground that the decision was contrary to the law or to the evidence, and appellant having failed to point out any error, we seek for none.

Where a party undertakes to rely upon a bill of exceptions he must show by means of it the error complained of, clearly and affirmatively; and he must further show, in order to have relief, that such error was prejudicial. 3 Ency. Pl. & Pr. 409, 410.

This court has on various occasions sought to impress upon counsel the purpose of an exception, which is to bring up for review "a specific question of law upon which the trial court

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has erroneously ruled to the prejudice of the party excepting, and not to enable a party to cast the entire case upon the court for review. Such a loose method of practice is unfair to both the opposite party and the court." *Fraga v. Port. Mut. Ben. Soc.*, 10 Haw. 128. See also *Gillespie v. McBryde*, 13 Haw. 432; *Mist v. Kapiolani Est.*, 13 Haw. 523, 525; *Serrao v. Soares*, 11 Haw. 284, 285; *Kapuakela v. Iaea*, 10 Haw. 99, 103.

The motion is granted and the bill of exceptions is dismissed.

T. M. Harrison for plaintiff.

D. H. Case and *Enos Vincent* for defendant submit the case on a brief.

ALLAIN PASQUOIN *v.* FRANK T. SANDERS AND
PACIFIC SHIPPING COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 10, 1911.

DECIDED JANUARY 12, 1911.

PERRY AND DE BOLT, JJ., AND CIRCUIT JUDGE COOPER
IN PLACE OF HARTWELL, C.J.

PROCESS—*Certificate of copy, by sheriff.*

Under R. L., §1721, the copy of the summons and of the petition may be certified by any one of the officers designated to whom the documents have been entrusted for service.

OPINION OF THE COURT BY PERRY, J.

The defendants filed separate motions to quash the service of summons, each on the ground that the copies of the summons and of the declaration had not been served as required by law and that of the Pacific Shipping Company on the further ground, relied upon in this court, that the original return of service did not show justification for substituted service on its agent. During the argument of the motions in the lower court

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the plaintiff asked that leave be granted for the filing of an amended return. The trial court said that the return was amendable "unquestionably, that is, according to our statute of amendments. It can be amended so as to state the facts as they existed at the time of service. It would be proper for the deputy high sheriff to amend so as to show that he made a search of the Territory and was unable to find defendant and found some officer or agent who represented defendant." The court, however, added that this statement was not intended as a ruling. Counsel for the defendant likewise said at the time, "If the service was properly made it can be amended." Subsequently an amended return by the deputy sheriff was filed showing the facts essential to support a substituted service, and still later the court, without referring specifically to the motion for leave to file an amended return, orally ruled, "It is ordered that defendant's motion to quash be and the same is hereby granted." (Apparently both motions to quash were intended to be granted.)

It is not contended that upon the facts stated in the amended return the substituted service must be set aside, but merely that the filing of the amended return was unauthorized by the court and that therefore the company's motion to quash must be granted. All are agreed, and it is clear, that a return is amendable so as to show the officer's acts done by way of service. Nothing would be gained by sustaining the motion to quash, striking the amendment from the record and thereupon immediately permitting the amendment to be filed. It is filed and discloses the facts necessary to justify substituted service. Upon this ground, therefore, the motion to quash is not sustained.

The main point relied upon by the appellees is that the copies of the summons and declaration were certified to by the deputy sheriff and not by the clerk of the court which issued the summons and that under our statutes the latter official only may so certify. The only section of our statutes relating to this

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precise subject is R. L., §1721, reading as follows: "Every summons issued under the seal of a court of record, shall be served by the high sheriff or his deputy, or a sheriff or deputy sheriff, upon the defendant, by the delivery to him of a certified copy thereof, and of the plaintiff's petition, to which petition shall always be annexed a literal copy of the voucher upon which it is predicated (if any there be), or in case the defendant cannot be found, by leaving such certified copy with some agent or person transacting the business of the defendant, or at the defendant's last place of residence." By whom the copy shall be certified is not specified. The language used is capable of the construction that the officer to whom the summons has been entrusted for service may make the certificate as well as, perhaps, that the clerk of the court issuing the summons may do so. This provision was first enacted, in substance, in 1859, and the unvarying practice has been for the certificate to be made by the sheriff or his deputy or other corresponding officer and not by the clerk, and the courts have by their silence acquiesced in this practice. It is well settled that courts "give great weight in a doubtful case to the contemporaneous and unvarying construction put upon a statute by all persons dealing under it." *Macfarlane v. Collector of Customs*, 11 Haw. 166, 177, 178. In the case just mentioned the court adopted as its own the following language: "The construction thus given to the law by that department, while not absolutely binding upon the courts, is not to be set aside but for the very best of reasons, e. g., if such construction is *clearly* erroneous. It is to be presumed that the legislature has been aware of the construction placed upon the statute and yet it has not seen fit to enact any amendment. The practical construction given to a doubtful statute by the public officers of the State and acted upon by the people thereof is to be considered; it is perhaps decisive in a case of doubt. This is similar in effect to a course of judicial decisions. * * * Contemporaneous construction and official usage for a long period by persons charged with the adminis-

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tration of the law are among the legitimate aids in the interpretation of statutes." Whether or not the clerk may make the certificate it is unnecessary to decide. We are not prepared to say that the construction that the sheriff or his deputy may do so is clearly erroneous. That construction should not, therefore, be disregarded or set aside.

The motions to quash should be denied, the exception is sustained and the cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

G. A. Davis for plaintiff.

C. F. Peterson for defendants.

SAMUEL K. PAAHAO, SARAH K. FERREIRA AND
JENNIE IOKUA *v.* SARAH A. SWINTON AND
ALVIN K. SWINTON, A MINOR.

APPEAL FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 21, 1910.

DECIDED JANUARY 16, 1911.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

EQUITY—*res judicata*.

A decree of the court of land registration that the grantees named in a deed were the owners of the land therein described, is a bar to a bill to reform the deed alleged to have been executed by the grantor by mistake and in consequence of the fraud of one of the grantees.

OPINION OF THE COURT BY DE BOLT, J.

This is a bill in equity filed by plaintiffs as heirs of Kaluna Paahao, deceased, to reform a deed so as to exclude from its effect one-half of the land therein described, which deed is alleged to have been executed by the decedent to defendants by mistake and in consequence of the fraud of the defendant Sarah A. Swinton, the intention of the grantor being, as it is alleged, to convey only one-half of the land, whereas the deed purports to

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convey the entire parcel. The bill further alleges, that defendants filed their petition in the court of land registration to confirm their title to the land in question, and that such proceedings were had in that court that a decree was entered declaring defendants the owners of the entire parcel, and that these plaintiffs have no interest therein; "that these plaintiffs appeared in said court * * * and opposed said petition, and insisted that said deed was fraudulent and should be avoided and annulled, and urged that if said deed should be established at all, it should be first so reformed as to convey only the Waikiki portion or half of the parcel aforesaid, but that said * * * court ruled that it did not possess equity powers such as to authorize it to reform the deed in question."

A demurrer to the bill having been sustained and the bill dismissed, the plaintiffs appealed to this court.

The demurrer presents this question: Is the decree entered in the court of land registration *res judicata* and a bar to the suit to reform the deed?

With regard to the organization, jurisdiction and powers of the court of land registration, in general, chapter 154, R. L., and Act 11, L. 1909, may be referred to; but we cite particularly, as being pertinent to the question before us, certain portions of sections 2395 and 2431, R. L., and of sections 4 and 5, Act 11, which read as follows:

(Sec. 2395.) "A court is hereby established, to be called the court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Territory, with power to hear and determine all questions arising upon such applications, and also have jurisdiction over such other questions as may come before it under this chapter, subject, however, to the right of appeal, as hereinafter provided: The proceedings upon such applications shall be proceedings in rem against the land, and the decree shall operate directly on the land and vest and establish title thereto."

(Sec. 2431.) "If the court after hearing finds that the ap-

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plicant has title, as stated in his application, and proper for registration, a decree of confirmation and registration shall be entered. Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Territory, whether mentioned by name in the application, notice or citation, or included in the general description 'to all to whom it may concern.' "

(Sec. 4.) "The court of land registration shall have power to make and award all such judgments, decrees, orders and other processes, and to take all other steps necessary for the promotion of justice in matters pending before it, and to carry into effect all powers which are, or may be given to it by the laws of the Territory."

(Sec. 5.) "The court may remove clouds on titles and may find and decree in whom the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person."

It will be observed that under the statutory authority cited the court of land registration has exclusive original jurisdiction of all applications for the registration of title to land, with power to hear and determine *all* questions arising upon such applications and to decree in whom the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person,—the title to the land being the issue before the court.

While it is true the court does not possess the general powers of either courts of law or of equity, and its jurisdiction is limited to the determination of the status of the title to land, nevertheless, for that single purpose, its powers are peculiarly adapted and are ample and complete. It does not possess power to reform a deed, but it may determine the validity of a deed, and accordingly, it may hear and consider any competent evidence to the end that a decree may be entered declaring in whom

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the title or any interest, legal or equitable in land is vested, whether in the applicant or in any other person, notwithstanding the express terms of any deed or instrument. The court proceeds directly to the question of title regardless of obstacles or technicalities. The statute was enacted with the sole purpose in view of affording an opportunity to settle and quiet titles, and the decree of the court thus created is final and conclusive against all persons.

It may be said of our statutory provisions in this regard and of our land court, as was said of a similar statute and court in Massachusetts, in *Cudahy Packing Co. v. Fairbanks Canning Co.*, reported in Massachusetts' Land Decisions, 222, that "The land registration act, however, is an act which looks solely to the determination of the status of the title to a given tract of land. The land court has full power both at law and in equity as to all questions that may arise in determining that matter, but there its jurisdiction ends. Its decrees are decrees in rem. The sole matter before it is the land, its title, its location on the ground, and an official declaration of the vested rights of any persons therein."

The proceedings being *in rem* the decree entered avails against all the world. Any person having an interest in the land may, however, interpose his claim and may also appeal from the decree. These plaintiffs availed themselves of this right to the extent of presenting their claim, but failed to appeal from the decree entered; hence, that decree is final and conclusive against them.

The court having jurisdiction of the subject matter, and power to hear evidence and to determine the title to the land in question, the ruling that it did not possess equity powers to re-form the deed, and for that reason would not hear the evidence as to the alleged fraud, is wholly immaterial so far as the question before us is concerned. The parties had the right to present their evidence and to have it considered by the court, but failing to appeal from the decree they are now bound by it.

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They have had their day in court. The title to the land has been adjudicated and the ownership finally determined.

With the record and proceedings thus before us it is obvious that the parties, the subject matter and the issue which were before the court of land registration are the same in the suit now on appeal before us; and, applying the fundamental principle, that an issue once determined by a court of competent jurisdiction may be relied upon as an effectual bar to any further dispute upon the same matter by the parties to the litigation, it follows that the decree entered in the court of land registration is *res judicata* and a bar to the suit to reform the deed.

In view of the conclusion reached the other questions presented need not be considered.

The decree sustaining the demurrer is affirmed.

C. W. Ashford for plaintiffs.

Magoon & Weaver for defendants.

IN THE MATTER OF THE PETITION OF JEW YUEN
MOW FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JANUARY 17, 1911.

DECIDED JANUARY 19, 1911

HARTWELL C.J., PERRY AND DE BOLT, JJ.

COSTS—*municipal officer exempt from.*

In causing the arrest and detention of the petitioner for a writ of habeas corpus the respondent having acted, in good faith, in his official capacity as sheriff of the City and County of Honolulu on behalf of the City and County, costs may not be taxed against the respondent even though the petitioner is ordered discharged from custody.

OPINION OF THE COURT BY PERRY J.

The appeal in this case is from an order under a writ of habeas corpus discharging the petitioner from the custody of the respondent and requiring the latter to pay the costs, taxed at

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§10. The petitioner having been subsequently taken to the State of California under extradition process and being now without this jurisdiction, the only question argued under the appeal is the correctness of the order relating to costs. In view of the provisions of Section 1 of Act 63 of the Laws of 1907 costs cannot be taxed against the respondent. That section reads: "Neither the Territory nor any County or Municipality thereof or any officer acting in his official capacity on behalf of the Territory or any County or Municipality thereof, shall be taxed costs or required to pay the same or file any bond or make any deposit for the same in any case." In the petition the allegation is that the respondent is restrained of his liberty by "William P. Jarrett, Esquire, Sheriff of the City and County of Honolulu, Territory of Hawaii, at and in that certain place known as the police station in said Honolulu, Territory aforesaid," and the prayer that the writ be issued directed to "William P. Jarrett, Esquire, Sheriff of the City and County of Honolulu, Territory of Hawaii." The writ is addressed to "William P. Jarrett, Esq., Sheriff of the City and County of Honolulu, Territory of Hawaii." The return is by Jarrett, "Sheriff of the City and County of Honolulu, Territory of Hawaii" and alleges inter alia that he, "as Sheriff of the City and County of Honolulu, Territory of Hawaii," caused the arrest and detention of the petitioner "awaiting the arrival of a requisition from the Governor of the State of California for the return to the State of California of the said" petitioner to there answer to a charge of embezzlement which had been made against him in one of the judicial tribunals of that State. In his oral traverse the petitioner "admits that the said respondent as Sheriff of the City and County of Honolulu did cause your said petitioner to be arrested," and that "the said respondent, Sheriff as aforesaid, continued to so detain your said petitioner" until a time stated.

The language of the statute is plain. No officer acting in his official capacity on behalf of the City and County may be taxed

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costs in *any* case. The facts, as far as they are material to the issue now under consideration, are undisputed. The respondent was the sheriff of the City and County of Honolulu and in arresting and detaining the petitioner acted, in good faith, in his official capacity on behalf of the City and County. That he erred, if he did, as to his power or his duty to arrest and detain the petitioner under the circumstances of the case, does not render the statute inapplicable. The exemption from costs necessarily contemplates, in some cases at least, judgment adverse to the official. Such a judgment is ordinarily a prerequisite to an adverse order as to costs.

The appeal from the judgment as a whole sufficiently presents the issue of the correctness of that part of the judgment relating to costs irrespective of whether or not the same issue might have been raised by a motion in the trial court to stay execution and an appeal from the order made upon such motion or in any other method.

The order requiring the respondent to pay costs is set aside and the cause is remanded to the circuit judge for such further proceedings, if any, as may be appropriate.

C. H. McBride for petitioner.

F. W. Milverton, Deputy City and County Attorney (*J. W. Cathcart*, City and County Attorney, with him on the brief), for respondent.

MARY A. DOWNEY *v.* EMALIA SILVA, SR., THOMAS SILVA, JOHN SILVA, GEORGE SILVA, SARAH SILVA, ROSIE O'HARA, MARY ANN HORNER, HATTIE DOAK, JOSEPH SILVA AND EMALIA SILVA, JR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 17, 1911.

DECIDED JANUARY 20, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

EQUITY—*cloud upon title—boundaries.*

Mere confusion of boundaries resulting from an overlap by two

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patents is not sufficient to give a court of equity jurisdiction to establish boundaries. There must be some special equity.

A bill to remove a cloud by settling boundaries can not be sustained under circumstances under which a bill to settle the boundaries could not be sustained.

OPINION OF THE COURT BY HARTWELL, C.J.

This was a bill in equity entitled "Bill to remove cloud on title," the plaintiff alleging that she is owner in fee simple, entitled to and in possession of all of the land described in Royal Patent 129, situate at Kaneohe in the Island of Oahu, dated December 24, 1850, based on Land Commission Award 3121 of October 15, 1850, and described in the patent by metes and bounds, with an area of 19.7 acres; that February 11, 1856, Royal Patent No. 2408, based on Land Commission Award 1889 of October 10, 1854, granted certain land, situate at said Kaneohe, claimed by the defendants and described in the patent by metes and bounds, with an area of 11.8 acres, which overlaps a portion of the premises conveyed under the plaintiff's earlier patent; that the defendants claim the overlapping portion under their patent; that the claim is invalid, and that the claim and Royal Patent 2408, Land Commission Award 1889, upon which it is based, constitute a cloud upon plaintiff's title, praying judgment that the said cloud upon the title of plaintiff be removed, and that "the title to said premises and the whole thereof be quieted in plaintiff." The defendants answered denying that the land claimed by the plaintiff was embraced in Royal Patent 129, Award 3121, or that plaintiff is its owner or "is in possession of any part of the land described in said Patent from which she seeks to remove cloud in this suit," alleging "that these defendants and their predecessors in title have, for more than twenty years last past been in the exclusive, hostile, open and notorious possession thereof, claiming it as their own."

Upon this pleading the court heard testimony and made a decree that "it appearing that the said defendants have not, nor has any of them, any estate, right, title or interest whatever in

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and to those certain premises and lands of the plaintiff in the said bill of complaint of the plaintiff particularly described, and that the plaintiff was in possession of said land at the time of the commencement of this suit, and is now in such possession and that the title of the plaintiff thereto is good and valid," the defendants "are forever enjoined and restrained from asserting any claim whatsoever in and to said land as described in said Land Commission Award No. 3121, Royal Patent 129, or any part thereof, adverse to said complainant," the decree containing a description of the land as in the Royal Patent, with certain modifications.

Upon the authority of *Perry v. Lucas*, 11 Haw. 350, 352, 354, 356, the bill must be dismissed for want of equity, there being no fraud, trust or other relations of an equitable nature suggested.

The court granted the injunction solely on the ground that upon the testimony it appeared that the plaintiff had title and was in possession, under her patent, of certain land which the defendants claimed to be in possession of and to be entitled to under their patent. In *Perry v. Lucas*, supra, it was held that "the mere allegation of an overlap or that both patents covered in part the same land" does not authorize a bill to establish boundaries to remedy a mistake of this kind, although "a bill to remove a cloud or a bill to reform a patent might lie in such a case under certain circumstances," but (354) "to give equity jurisdiction there must be some special equity, such as fraud; or a relation between the parties which makes it the duty of one of them to preserve the boundaries; or the prevention of a multiplicity of suits," and, furthermore (356), that the bill could not "be sustained as one to remove a cloud by settling the boundaries, for that would be to sustain it as a bill to settle the boundaries (which we have seen cannot be done upon the allegations of this bill) merely by calling it a bill to remove a cloud."

The case cited established in 1898 the rule that the mere

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fact that one patent overlaps another does not give equity jurisdiction for the purpose of reforming the patent, especially if the bill does not show how it ought to be reformed, nor to settle the boundaries by invoking the jurisdiction of equity to remove a cloud upon the title. Presumably the practice then has conformed to the rule thus laid down, so that even if the rule were in apparent conflict with many decisions elsewhere no good purpose would be subserved by considering the question as if it were now before us de novo. For the purpose of obtaining a decree declaring the plaintiff's title to the land in controversy the statutory remedy of an action to quiet title would appear to be a fully adequate remedy for the plaintiff. There is no reason why the defendants should not have demurred to the bill for lack of jurisdiction instead of causing the unnecessary delay and expense of a trial of the irrelevant facts pleaded in their answer.

Decree reversed, bill dismissed without prejudice.

C. C. Bitting (Thompson, Clemons & Wilder on the brief) for plaintiff.

J. A. Magoon (Magoon & Weaver on the brief) for defendants.

No. 26. *L. L. McCANDLESS v. MARSTON CAMPBELL*, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII. Exceptions from Circuit Court, First Circuit. Decided January 27, 1911. Hartwell, C.J., Perry and De Bolt, JJ. Per curiam: This is a bill of exceptions brought by the defendant, and allowed by the circuit judge, from a decision of the circuit judge overruling a demurrer to the plaintiff's petition for a writ of mandamus. The attention of the defendant having been called by the court to the lack of jurisdiction for bills of exceptions in matters at chambers, he informed the court that he considered that the

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exceptions were not properly brought and ought to be dismissed, and it is accordingly so ordered.

W. S. Edings and P. L. Weaver for plaintiff.

E. W. Sutton, Deputy Attorney General, for defendant.

MARSTON CAMPBELL, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, *v.* JAMES STEINER, MRS. THERESA LOUISSON, THE FIRST NATIONAL BANK OF HAWAII, AN HAWAIIAN CORPORATION HAVING ITS PRINCIPAL OFFICE AT HONOLULU, TERRITORY OF HAWAII, ELIZABETH J. MONSARRAT, R. W. SHINGLE, SIMPSON DECKER, JESSE M. McCHESNEY, ED. TOWSE, AND CHARLES W. ZEIGLER, TRUSTEES OF MYSTIC LODGE NO. 2, KNIGHTS OF PYTHIAS OF HONOLULU, MYSTIC LODGE NO. 2, KNIGHTS OF PYTHIAS OF HONOLULU, LIBERT HUBERT J. L. BOEYNAEMS, BISHOP OF ZEUGMA, VICAR APOSTOLIC OF HAWAII, ST. LOUIS COLLEGE ALUMNI ASSOCIATION, AN HAWAIIAN CORPORATION HAVING ITS PRINCIPAL OFFICE AT HONOLULU, TERRITORY OF HAWAII, JAMES F. MORGAN, JOHN SULLIVAN, JOHN BUCKLEY, JOHN DOE, MARY DOE, AND RICHARD ROE, UNKNOWN OWNERS AND CLAIMANTS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 18, 1911.

DECIDED JANUARY 28, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

PARTIES—*amendment—substitution.*

While the statute permits amendments to pleadings by adding or striking out the name of any party, it does not authorize the substitution of a new party for the sole party plaintiff.

Campbell v. Steiner, 20 Haw. 365.

OPINION OF THE COURT BY PERRY, J.

(Hartwell, C.J., dissenting.)

This is a petition for the condemnation of land claimed to be required for the extension of Bishop Street as a public highway in this city. Defendants Sullivan and Morgan demurred to the petition, on the grounds, among others, that "the plaintiff herein named is not the proper party plaintiff" and that "no map is made to accompany the complaint (petition) which correctly delineates the land sought to be condemned and its location." To the overruling of the demurrer the defendants excepted and an interlocutory bill of exceptions was allowed.

Under other grounds of the demurrer it is contended by the defendants that the provisions of Act 67 of the Laws of 1907 "for the exercise by counties of the power of eminent domain for certain public purposes" operate to deprive the superintendent of public works of any power he might otherwise have had to require the condemnation of land for use as public highways and that, even if Act 67 is not thus exclusive, land for road purposes may be condemned only under Chapter 52 of the Revised Laws and not under Chapter 40, under which these proceedings were brought. It is unnecessary to pass upon these contentions for even if land for the opening of highways may be condemned under Chapter 40 the present petition must be dismissed.

Chapter 40 is entitled and relates solely to "Eminent Domain." It opens, in its first section (R. L. 491, amended by Act 10, L. 1909), with the statement that "private property may be taken for the following purposes, which are declared to be public uses," enumerating, *inter alia*, "all necessary land over which to construct roads." Section 492 provides that "no property shall be taken by virtue of this chapter unless it shall appear that it is to be put to some public use and that the taking is necessary to such use," Section 493 that a fee simple estate may be acquired "for all the purposes mentioned in section 491" and Section 495 that any agent of the Territory may survey any land sought to be condemned under the chapter. By

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Sections 496 and 497 the circuit courts are given jurisdiction of "all actions arising under this chapter" and it is prescribed that "where not otherwise expressly provided * * * the procedure shall be the same as in other civil actions." It is then provided, in Section 498, that "the superintendent of public works in his official capacity may institute proceedings on behalf of the Territory of Hawaii for the condemnation of property as provided for in this chapter." Although it is said in the section last mentioned that "the superintendent of public works may be referred to in this chapter as the plaintiff" and later in the chapter that upon the conclusion of certain proceedings "the property described shall vest in the plaintiff," it is clear, we think, that the Territory should be the party plaintiff in all such proceedings. All condemnations are for public uses and any action of the superintendent is purely "on behalf of the Territory" and its agent.

The petition under consideration is entitled "Marston Campbell, Superintendent of Public Works of the Territory of Hawaii, Plaintiff and Petitioner, vs. James Steiner" and others. The opening paragraph is, "Now comes Marston Campbell, Superintendent of Public Works of the Territory of Hawaii, acting on behalf of the Territory of Hawaii, named hereinabove as plaintiff and petitioner, and represents * * * as follows." The petition also contains the following statements: "that according to law the plaintiff herein, as said Superintendent of Public Works, acting on behalf of the Territory of Hawaii as aforesaid, * * * is invested with the power * * * to condemn and hold for any public use" real estate; "and in pursuance of * * * said power * * * said plaintiff * * * is desirous of * * * condemning and holding" certain pieces of land described; that pursuant to this power it is the "desire of plaintiff to acquire a fee simple estate" in the land described; "that the purpose for which plaintiff" is desirous of "condemning and holding the aforesaid pieces and parcels of land" is a public use; and "that the nec-

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essity for the acquisition * * * and holding in and by a fee simple estate" of the land described "by plaintiff" arises in a stated manner. The prayer is that it be adjudged that the public use mentioned "requires the acquisition by condemnation to this plaintiff" of the land described. While it is alleged in the petition that the superintendent is acting in this matter in behalf of the Territory, the petition is that of Marston Campbell, superintendent of public works. The effect of the title and of the allegations is to make the superintendent and not the Territory the party plaintiff. The prayer is that the condemnation be to him and not to the Territory. It was definitely held in *Cleghorn v. Macfarlane*, 7 Haw, 314, 316, that "A. S. Cleghorn, the Collector General, in behalf of the Hawaiian Government, does not make the Hawaiian Government the plaintiff" and the demurrer was sustained and judgment entered that the plaintiff take nothing. That ruling is applicable to the case at bar. If the Territory is not now the plaintiff it cannot be made so by amendment. Our statute on amendments (R. L., Sec. 1738) is liberal in its provisions, permitting, among other things, an amendment of a petition by "adding or striking out the name of any party or by correcting a mistake in the name of a party" but it does not permit the substitution of a new party in the place of a sole party plaintiff or defendant. *Kau Ting Kee v. Yim You*, 14 Haw. 112. See also *Lum Sung v. Luning*, 13 Haw. 665, 667, and *Cooper v. Hao*, 12 Haw. 131. In the latter case, an action of ejectment, this court sustained the direction of a verdict for the defendant on the ground that the department of public instruction and not "Henry E. Cooper, Minister of Public Instruction," was the proper party plaintiff. If the amendment "only cures a mistake in the name of the party by or against whom the suit is prosecuted it may be made; but if it introduces a different party it is inadmissible." 1 Ency. Pl. & Pr. 535, 536. The present is not an instance of a mere error in the name of the party.

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In *Meek v. Aswan*, 7 Haw. 750, the action was entitled "Eliza Meek, a minor, by G. S. Houghtailing, her guardian, v. Aswan." The trial court dismissed the case on the ground that "the action was improperly brought in the name of the minor by her guardian, whereas the complaint should read G. S. Houghtailing, guardian of Eliza Meek." On exceptions this court held that "the court below erred in holding that the complaint was improperly brought by Eliza Meek, a minor, by G. S. Houghtailing, her guardian," saying that "it was the suit of the minor and not that of the guardian" and that "the complaint in the lower court was correct." The exceptions were sustained and the case ordered reinstated for trial. The actual decision in that case sustains our view that the Territory and not the superintendent is the proper party plaintiff. The remark that "the objection to the complaint, even if tenable, should not have been visited with a dismissal, but an amendment should have been allowed," was obiter dictum and is inapplicable to the facts of the case under consideration.

On the other ground of demurrer nothing need be said beyond calling attention to the plain provision of the statute (R. L. Sec. 499) that "a map must accompany the complaint which shall correctly delineate the land sought to be condemned and its location." This requirement will undoubtedly be complied with in new proceedings, if any, under Chapter 40.

The demurrer should be sustained without leave to amend and without prejudice to the right of the Territory or other governmental authority to institute such proceedings as may be advised. The exceptions are sustained and the cause remanded for further proceedings not inconsistent with this opinion.

E. W. Sutton, Deputy Attorney General (*Alexander Lindsay, Jr.*, Attorney General, with him on the brief), for plaintiff.

A. A. Wilder (*Thompson, Clemons & Wilder* on the brief) for defendants.

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DISSENTING OPINION OF HARTWELL, C.J.

I agree that the Territory, and not the superintendent, should be the plaintiff, but I think that the petition could be amended as was done in *Chappell v. U. S.*, 160 U. S. 499, and in conformity with the suggestion in *Meek v. Aswan*, 7 Haw. 750, 754, in which it was held that "the objection to the complaint (that an action by a guardian to recover rent for use of the minor's land should be brought in the name of the minor, by her guardian, and not in the name of the guardian), even if tenable, should not have been visited with a dismissal, but an amendment should have been allowed." In this view the other questions presented by the demurrer would require adjudication, namely, the jurisdiction of the Territory to condemn land for highways, the necessity of a prior appropriation for the purpose, the averment that preliminary steps, without specifying them, have been taken, and the failure to accompany the petition with a map, all of which exceptions, I think, should have been overruled except that relating to the map, which would permit, as I think, an amendment.

M. F. SCOTT v. JOE HENRIQUES.

APPEAL FROM DISTRICT MAGISTRATE, NORTH KONA.

SUBMITTED JANUARY 30, 1911.

DECIDED FEBRUARY 2, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

LIMITATION OF ACTIONS—*judgments—appeals.*

No action lies on a judgment pending an appeal, and therefore the statute of limitations does not then begin to run.

OPINION OF THE COURT BY HARTWELL, C.J.

This is an appeal from a decision of the magistrate sustaining defendant's demurrer to the plaintiff's complaint in an action of debt brought December 21, 1910, on a judgment ren-

Scott v. Henriques, 20 Haw. 370.

dered in the district court September 29, 1903, on the ground that the action was barred by the statute of limitations, more than six years having elapsed since it was rendered. The complaint shows that the defendant appealed from the former judgment to the circuit judge, instead of the circuit court, and his appeal having been dismissed by the circuit judge January 2, 1904, he appealed to the supreme court, by which his appeal was dismissed December 27, 1904. If the statute did not begin to run, as claimed by the plaintiff, pending the appeals, the demurrer should not have been sustained.

The defendant contends that an abortive appeal, such as was made in this case, is absolutely void, and not such as is contemplated by Sec. 1861 R. L., which provides: "An appeal duly taken and perfected in any case from a judgment, order or decree of a circuit judge or district magistrate shall operate as an arrest of judgment and stay of execution;" also that Sec. 1808 R. L. gave the plaintiff the right to take out execution on his judgment or obtain a new execution, or "at any time after the judgment (to) have an action of debt thereon." This contention cannot be sustained. The statute allows the action to be brought "at any time after the judgment, subject to the statute of limitations." An appeal may be "duly taken and perfected" and, as was done in this case, allowed, although not authorized by statute. The plaintiff could not have levied execution pending the appeal unless upon an order from the magistrate allowing it on the ground that the appeal ought not to have been allowed, and until authorized by competent judicial authority he could not properly have treated his appeal as void.

Decision reversed, case remanded.

Plaintiff in person.

Eugene K. Aiu for defendant.

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HENRY ST. JOHN NAHAOLELUA, GEORGE WILLIAM NAHAOLELUA, JOHN V. NAHAOLELUA, CHARLES K. NAHAOLELUA, ALBERT K. NAHAOLELUA, ALEXANDER K. NAHAOLELUA, ALICE K. NAHAOLELUA LANE, WIFE OF JOHN C. LANE, AND EMMA K. NAHAOLELUA *v.* H. A. HEEN.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 19, 1911.

DECIDED FEBRUARY 2, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

DEEDS—construction—trusts.

A deed by E. to C. and N., conveying land to them in trust for the use of E. until her marriage with H. and after the marriage to pay the net income to her during her coverture with H. and in case of her death after the marriage and during the life time of H., leaving issue of the marriage, to apply the net income to the maintenance of such issue during minority and upon such issue attaining majority to convey the land to them; Held,—H. having died in the life time of E.,—that the possibility of such issue acquiring an interest in the land entirely vanished upon the death of H.

Id.—trusts—revocation.

A conveyance in trust, although the deed contains no express power of revocation, may be revoked by the consent of all parties in interest.

Id.—construction.

A deed to E. and "the heirs of her body," habendum to E. and "the heirs of her body forever," conveys a life-estate to E., remainder in fee simple to her children.

OPINION OF THE COURT BY DE BOLT, J.

This was a statutory action to quiet title to a parcel of land situate at Kamakela, in Honolulu, being a portion of apana 1, R. P. 1985, L. C. A. 6245, containing an area of 760 square feet, in which the plaintiffs claim an undivided one-half interest in fee simple, it being conceded that the defendant is the owner of the other undivided one-half interest in fee simple. The cause, jury waived, was tried and submitted on stipulated

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facts, the decision of the court being in favor of the defendant; and judgment was entered accordingly. The plaintiffs bring the case here on exceptions.

The stipulation shows that the plaintiffs are the children of Elizabeth Kahele St. John Huakini, surviving issue of her marriage with Edward George Huakini; that on August 10, 1871, Elizabeth, being then unmarried and the owner in fee simple of an undivided one-half interest in the land in question as tenant in common with her brother, Henry St. John, in consideration of her intended marriage with Huakini "and of the sum of one dollar to her in hand paid," executed and delivered to Archibald Scott Cleghorn and P. Nahaoelua a certain deed, the material parts of which, so far as it is necessary to understand the questions involved in this controversy are as follows:

"To have and to hold the same unto the said Archibald Scott Cleghorn and P. Nahaoelua, their heirs and assigns, and to the survivor of them, and his heirs and assigns forever, but upon the special trusts and for the uses and purposes and subject to the powers and obligations hereinafter expressed and declared of and concerning the same, that is to say: in trust for the use of the said Elizabeth Kahele St. John until the solemnization of the said intended marriage, and after the solemnization thereof, upon trust to collect and receive the rents, issues and profits of the said several lands and premises as the same shall hereafter become due and payable, and after the deduction therefrom of all incidental expenses in the management of the said lands and premises, to pay over the same to the said Elizabeth Kahele St. John upon her own separate receipt and free from the control and interference of any person whomsoever during her said intended coverture, and upon further trust, that in case of the decease of the said Elizabeth Kahele St. John after the solemnization of said marriage and during the lifetime of her said intended husband Edward George Huakini leaving issue of the said intended marriage, then, upon trust, to pay and apply the said rents and profits of the said lands to and for the support, maintenance, education and advancement of such issue in such shares and proportions as the

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trustee or trustees shall deem expedient during the minority of such issue, and if only one child shall then survive, then, upon trust, to pay and apply such rents and profits or such part thereof as may be requisite for the support, maintenance, education and advancement of such child during its minority. And upon further trust, that upon such child or children if more than one, attaining legal majority, the said trustees of this settlement or the survivor of them, his heirs and assigns, shall release and convey to such child, if only one, and if more than one, then to such children issue of the said marriage, their heirs and assigns forever, all of the said lands and premises hereinbefore mentioned and described free from incumbrance."

The stipulation further shows that Elizabeth and Huakini were married in the year 1871, and on July 8, 1872, a son, Edward Nahonoomaui Kia, was born to them, and that he died on September 15, 1887, unmarried; that on September 13, 1873, the grantees named in the deed of August 10, 1871, executed and delivered to Elizabeth the following deed:

"This indenture made this 13th day of September, A. D. 1873, by and between Archibald Scott Cleghorn * * * and P. Nahaolelua * * * of the first part, and Elizabeth Kahele St. John Huakini, * * * the party of the second part:

"Whereas, the said party of the second part made and executed an ante-nuptial deed of trust to the said parties of the first part bearing date the 10th day of August, A. D. 1871, * * * to certain real estate therein described; that since the execution of the deed of trust aforesaid, the said party of the second part has married Edward George Huakini, and has had issue a son named Edward Nahonoomaui Kia, now living, and that her brother Henry St. John has since deceased, and the said party of the second part has inherited his estate.

"Therefore this indenture witnesseth: That the said parties of the first part in consideration of the premises, the marriage of the said party of the second part, and the birth of a son now living, and at the special request of the said party of the second part, and of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, released and conveyed, and by these presents do grant, release and convey to the said party

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of the second part, and to the heirs of her body, all and singular the real estate and premises mentioned and described in the deed of trust aforesaid * * *.

"To have and to hold the same to the said Elizabeth Kahele St. John Huakini, party of the second part, and the heirs of her body forever.

"In special trust for the use and benefit of her said son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns forever as he or they shall arrive at the age of legal majority. * * *"

The stipulation further shows than on June 2, 1896, Elizabeth and her husband conveyed to one Jane Clark all their interest in the land in question, which interest, the defendant, by mesne conveyances, acquired and now holds; that the defendant and his predecessors in title, since June 2, 1896, have been in open and notorious possession of the entire parcel of land, claiming the same in fee simple; that Huakini died on June 13, 1901, and his wife, Elizabeth, died on March 8, 1909, leaving the plaintiffs surviving her, they being the heirs of her body and her sole heirs at law.

The trusts as expressed in the deed of August 10, 1871, and upon which the land was conveyed, may be summarized as follows: First, for the use of Elizabeth until the marriage; second, after the marriage, to pay the net income to her during her coverture with Huakini; third, in case of her death after the marriage and during the lifetime of Huakini, leaving issue of the marriage, to apply the net income to the maintenance of such issue during minority; and fourth, upon such issue attaining majority, to convey the land to them.

Thus it will be observed, that the sole contingency upon which the plaintiffs could have possibly become entitled to any interest in the land never happened, namely, the death of Elizabeth after the marriage and during the lifetime of Huakini.

The deed of August 10, 1871, contained no express power

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of revocation, but it is elementary that a trust may be revoked by the consent of all the parties in interest; and, applying this rule, it is clear that the parties to the deed of September 13, 1873, they being the only persons who had any interest in the land, intended to and did thereby revoke the first deed. It is true that there was a possibility of the plaintiffs acquiring an interest in the land; their position in this respect, however, being one of expectancy only, and even this possibility entirely vanished upon the death of Huakini in the lifetime of Elizabeth.

In view of the conclusion reached with regard to the deed of August 10, 1871, the decision of the case now depends solely upon the force and legal effect of the deed of September 13, 1873. If by this latter conveyance the grantee, Elizabeth, acquired an estate in fee simple, or the power, as against "the heirs of her body," to dispose of and convey the land in fee simple, then it is clear that the plaintiffs have no valid claim to the premises, the title in fee simple to the entire parcel of land having passed, by mesne conveyances, to the defendant. But if that conveyance, in legal effect, gave the grantee only an estate for life, with remainder in fee simple to her children, then it is equally clear, that upon the death of the grantee, Elizabeth, the plaintiffs became entitled to the possession of an undivided one-half interest in the land in fee simple.

Under the common law, as modified by the statute *de donis conditionalibus*, the deed of September 13, 1873, would have created an estate tail, beyond any question. "The technical language to create an estate tail is to limit the estate to a man and the heirs of his body." *Sutton v. Miles*, 10 R. I. 348, 350; 2 Blackstone, 111; 4 Kent 11; 1 Wash. Real Prop., 74, 77. The phrase, "the heirs of her body," as used in the deed, are, therefore, the appropriate words to create an estate tail. They are words of inheritance, as well as apt words of procreation, which are essential to the creation of an estate tail. 11 Am. & Eng. Ency. Law, 372. But as an estate tail cannot exist

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or be created in this Territory (*Rooke v. Queen's Hospital*, 12 Haw. 375, 391), the question arises, What estate did Elizabeth take by the deed of September 13, 1873, and if not a fee simple, then what were the rights of "the heirs of her body," the plaintiffs, to any remainder? In the *Rooke* case, *supra* (pp. 394, 395), the court said: "In some of the States in which fees tail do not exist, the estate is considered a fee simple in the first taker, in others a life-estate in the first taker and a remainder in fee simple in the issue, while in others it is considered one or the other according to which appears to most nearly carry out the intention of the testator." The first two classes of cases mentioned in the quotation depend upon statutes, while the third class, to which the case at bar belongs, is governed by the established rules of construction.

"The intent of the parties to a deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law. * * * The intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable, when not contrary to law." 2 Devlin on Deeds, §§836, 837. Applying this rule it is apparent that the intent of the parties to the deed of September 13, 1873, will be most nearly carried out by holding that Elizabeth should take a life-estate, with remainder in fee simple to the plaintiffs, "the heirs of her body." This view gives effect as nearly as possible to those formal parts of the deed, usually regarded as being sufficient, under the law, to pass title. And, in this connection, we deem it pertinent to observe that the following provision, contained in the deed before us, reading: "In special trust for the use and benefit of her said son Edward Nahonoomaui Kia, and such other child or children as may hereafter be born to her, and his or their heirs and assigns, forever as he or they shall arrive at the age of legal majority," being repugnant and contradictory to the formal parts of the deed, must be disregarded. *Simerson v. Simerson*, ante p. 57.

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With regard to the statute of limitations, which the defendant seeks to interpose in the event it should be held that the plaintiffs took a fee simple title, it is clear that the statute does not apply, because the plaintiffs were not entitled to possession until the death of their mother, which event occurred not less than two years ago. Wood on Limitations, §259; Newell on Ejectment, p. 47.

The plaintiffs, inter alia, saved an exception to the decision of the trial court on the ground that it did not state the reasons therefor. At the argument this exception was withdrawn and we have not, therefore, considered it. The other exceptions are sustained; the decision and judgment are set aside and vacated, and a new trial is granted.

A. A. Wilder (*Thompson, Clemons & Wilder and E. M. Watson* on the brief) for plaintiffs.

J. A. Magoon (*Magoon & Weaver* on the brief) for the defendant.

ROSALIE LYONS v. JOSE V. MACIEL, EXECUTOR,
AND C. D. LUFKIN AND T. B. LYONS, ADMIN-
ISTRATORS WITH THE WILL ANNEXED OF
THE ESTATE OF AUGUSTINE ENOS, DE-
CEASED.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED JANUARY 23, 1911.

DECIDED FEBRUARY 7, 1911.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

LIMITATION OF ACTIONS—*minors—actions against former guardian.*

The general rule is that the right of action by a ward against a former guardian accrues upon the ward's attaining majority or upon her marriage and that the statute of limitations commences to run from that date.

RELEASE—*evidence.*

Payment and release may be inferred from facts shown by the evidence.

EVIDENCE—*assumpsit—burden of proof.*

In assumpsit for money had and received from sales of plain-

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tiff's cattle the burden is upon the plaintiff to prove the essential facts by evidence sufficiently clear and satisfactory to enable the jury to intelligently make the necessary findings.

OPINION OF THE COURT BY PERRY, J.

This is an action of assumpsit brought against the representatives of Augustine Enos, the deceased father of the plaintiff. The claim is for \$2900, the total of rents alleged to have been collected by Enos for his daughter, and for \$8700 for moneys alleged to have been received by Enos as the proceeds of cattle belonging to the plaintiff and sold by him from time to time during the twenty-five years next preceeding April 23, 1901. The trial before a jury resulted in a verdict for the defendants. The plaintiff thereupon sued out this writ making nine assignments of error. The defendants moved to dismiss the writ on the ground that it was not issued within six months from the rendition of judgment, the verdict having been rendered on April 2, 1910, the formal judgment thereon entered August 27, 1910, and the writ issued December 15, 1910. It is unnecessary to pass upon this motion in view of the result reached concerning the assignments of error.

Assignments 1 and 4. Plaintiff requested the court to instruct the jury as follows: "If you find from the evidence that A. Enos, in his lifetime, collected rents from property belonging to the plaintiff, and received money from the sale of cattle belonging to the plaintiff, and was, at his death indebted to the plaintiff, and if you also find that A. Enos, in his lifetime deeded to the plaintiff certain lands, I instruct you that you can not charge the plaintiff with the value of such lands so deeded, nor credit his estate with the value of such lands, unless you find from the evidence introduced before you either oral or documentary in this case that it was agreed and understood between the plaintiff and said A. Enos in his lifetime that he, said A. Enos, should be credited with the value of such lands." The court modified the instruction by striking out the words, "col-

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lected rents from property belonging to the plaintiff and," and then gave it as modified.

At defendants' request the following instruction was given: "I instruct you, gentlemen of the jury, that the items of rent in the account sued on and testified to on the trial hereof are barred by the statutes of limitations in that the uncontradicted evidence shows that the last collection of any rent on the Honolulu property of the plaintiff was made by the decedent, A. Enos, in the year 1896, and that the last collection of any rent on the Wailuku property of the plaintiff was made in December, 1898."

There was evidence sufficient to support a finding of the following facts: that the decedent, Enos, was the father of the plaintiff; that the plaintiff was born September 18, 1875, came of age September 18, 1893, and was married to her present husband January 18, 1894; that her father died March 6, 1906; that during her minority she owned a piece of land at Wailuku and another piece in Honolulu, and that for some years her father collected the rents from these two pieces of property. The evidence, however, is undisputed that the last collection of rent of the Wailuku land, made by decedent, was in 1898, and of the Honolulu property in 1896. There was no evidence of any collection of rents by the decedent after those years. The instructions, therefore, were correct as given. More than six years had elapsed between the date of the last collection and the decedent's death. The decedent was, indeed, the natural guardian of the plaintiff but that guardianship terminated with her majority in 1893 or, at latest, at her marriage in 1894. The trust created by the relation of guardian and ward terminated with the guardianship and her right of action against the guardian accrued at that time unless the relation of trust and confidence continued, in fact, after that event. Wood on Limitations of Actions, §204; 25 Cyc. 1263. There was no evidence tending to show that after the plaintiff's marriage decedent continued to occupy a fiduciary capacity towards her as

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her confidential agent. On the contrary, the only evidence on the point, that of the plaintiff herself, is that her husband "looked after her business" after her marriage, that the plaintiff sold her Wailuku land on January 22, 1898, gave an option on the Honolulu land in January, 1899, and sold it on May 23, 1900, and that through an attorney she caused demand to be made upon her father for payment of her claim against him relating to cattle, her evidence being that this claim was made in 1897 or 1898, although subsequently she modified this testimony by saying that perhaps it was in 1902. The subject of rents was correctly withdrawn from the jury. A verdict in plaintiff's favor upon that phase of the case would have been unsupported by evidence.

Assignment No. 2. This relates to the court's refusal to give an instruction requested by the plaintiff. It is sufficient to say upon this point, that that instruction was endorsed by the trial judge, "Refused as not demanded." In other words, it was withdrawn.

Assignment No. 3. The court gave an instruction requested by the defendants and reading as follows: "I instruct you that the deceased, A. Enos, was the natural guardian of the plaintiff, and by the law of this Territory was the guardian of the property of the plaintiff during her minority; that on reaching the age of twenty years, to-wit: on the 18th day of September, 1895, the plaintiff was entitled to an accounting from the deceased and was entitled without previous demand to sue the deceased for the possession of any moneys or property belonging to her in his hands; that the statutes of limitations commenced to run in respect to any claims she might have against the said A. Enos on the said 18th day of September, 1895, and by the 18th day of September, 1901, was a complete bar to any recovery by the plaintiff in respect to such claims, unless you find from the evidence that A. Enos continued to act in a fiduciary capacity as the plaintiff's confidential agent up to a time within six years of his death." Passing by the inaccuracy, in plain-

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tiff's favor, whereby the plaintiff was declared to have become of age in September, 1895, instead of September, 1893, and the fact, likewise favorable to the plaintiff, that it left to the jury the question of rents, the instruction correctly stated the law.

Assignment No. 5. The following instruction requested by the defendants was given: "I instruct you, gentlemen of the jury, that if you believe from the evidence that during the lifetime of A. Enos, deceased, a settlement was made between the said A. Enos and the plaintiff herein as to the items now sued upon, and that a release was given in respect thereof by the plaintiff to the said A. Enos, your verdict should be for the defendant. I further instruct you that if you should find there was such a release that such release need not be in writing, and may be inferred from the conduct and dealings between said A. Enos, deceased, and the plaintiff, if the evidence warrants such inference." The argument in support of this assignment is that there was no evidence justifying the finding of a release by plaintiff of her claims against the decedent. There was evidence from which the following facts could have been found by the jury: that on February 7, 1896, the decedent conveyed to the plaintiff certain land, the deed reciting that it was made in consideration of one dollar, love and affection "and also for divers other good causes and considerations;" that later the plaintiff sold this land for the sum of \$2750; that when the plaintiff was about six years old she was given a heifer calf which was pastured upon a cattle ranch conducted by her father and one Ferreira as partners; that in the course of time there was increase from that animal (there was considerable conflict in the evidence as to the number of such increase); that the cattle so acquired by the plaintiff were from time to time branded with her father's individual brand (not the partnership brand) and marked with an ear-mark of her own; that about 1893, 1894 or 1895, plaintiff's cattle ceased to be marked with her ear-mark and that thereafter none were so marked, although

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presumably the animals remained on the same ranch, but all were given the decedent's ear-mark; that the plaintiff and her father "had not been on speaking terms for years" and that the reconciliation took place in December, 1895; that through purchases made at a merchandise store, owned wholly or in part by her father, the plaintiff had incurred a debt of about \$700, and that in July, 1901, this obligation was wiped out by the decedent purely as a gift to his daughter; that in other ways, both after the reconciliation and during the plaintiff's minority, the decedent was a generous father making his daughter presents of money from time to time; that at no time did the plaintiff bring any suit against her father during his lifetime, and that Enos was financially able to have paid her at any time if she had had any just claims upon him. Upon this evidence we think that the jury would have been justified in finding that the plaintiff released her father from all the claims which she might otherwise have had against him, either with reference to the rents or with reference to the cattle at one time owned by her.

Assignment No. 6. At defendants' request the court instructed the jury: "I instruct you, gentlemen of the jury, that if the only evidence that has been offered on the trial of this case as to sales by the decedent, A. Enos, of cattle belonging to the plaintiff is as follows, viz: That on October 18, 1884, four steers were sold for the sum of \$29.00; that on June 15, 1889, 1 steer was sold for the sum of \$20.00; that on August 31, 1889, 1 cow was sold for the sum of \$17.00, and that on January 31, 1892, 2 cows were sold for the sum of \$40.60, and as none of these items are involved in demand made by plaintiff on the estate I further instruct you that you cannot award to the plaintiff in respect of the claim set forth in the second cause of action in the amended complaint filed herein any sum." The objection to this instruction is based largely on the supposition that the word "if" in the first line was not in the instruction as given. The record, however, shows beyond doubt that it was there. In

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that form the instruction was unobjectionable. The specific sales of cattle mentioned all took place, if at all, before 1893 and recovery upon them was barred by the general statute of limitations. Moreover, the claim presented by the plaintiff against the representatives of the deceased, and now relied upon in this action, relates solely to the "proceeds of sale of 580 head of cattle * * * on or about the 23rd day of April, 1901," and does not include these four sales. Another claim, presented January 19, 1907, was, indeed, sufficient to include these items, but no action was brought upon it within two months of its rejection. It was apparently abandoned and reliance thereafter had upon the claim first mentioned, which was presented March 7, 1907.

Assignment No. 7. At defendants' request the following instruction was given: "I instruct you, gentlemen of the jury, that before you can find a verdict for the plaintiff in respect to the claim for the sum of \$8700.00, set forth as the second cause of action in plaintiff's amended complaint, you must be satisfied from the evidence that A. Enos, deceased, did on or about the 23rd day of April, 1901, sell certain cattle belonging to the plaintiff, and that if you are so satisfied you must also be able to determine from the evidence the number of cattle belonging to the plaintiff so sold and the price for which they were sold." There was no error in this instruction. The burden was upon the plaintiff to prove the fact of a sale of cattle on or about April 23, 1901, and also to show by satisfactory evidence the number of cattle so sold and the amount of the proceeds. If the evidence adduced was so vague and unsatisfactory that no finding concerning these facts could be intelligently based upon it the only result possible would be a verdict for the defendants.

Assignments 8 and 9. These are to the effect that the verdict and the judgment are contrary to the law and the evidence. As already pointed out the evidence was sufficient to justify the verdict.

The judgment is affirmed.

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G. A. Davis (Atkinson & Quarles on the brief) for plaintiff.
W. L. Stanley (Holmes, Stanley & Olson and D. H. Case
on the brief) for defendants.

CYPRIAN FREITAS *v.* PIONEER MILL COMPANY,
LIMITED.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED JANUARY 27, 1911.

DECIDED FEBRUARY 14, 1911.

HARTWELL, C.J., PERRY AND DE BOLT, JJ.

NEGLIGENCE—*master and servant—evidence by servant—hazard of employment—directed verdict.*

In an action by a servant against his master to recover damages for personal injuries alleged to have been sustained by him as the result of the master's negligence, it was incumbent on the servant to show affirmatively a neglect of some duty on the part of the master, which the master owed to him while so employed, and which neglect was the sole and proximate cause of the injury. There being no evidence of negligence, the injury must be considered one of the usual and ordinary risks incident to the employment, which the servant assumed, and an order of court directing a verdict for the master is correct.

OPINION OF THE COURT BY DE BOLT, J.

This is a writ of error to review a judgment of the circuit court of the second circuit. The plaintiff in error brought an action against the defendant in error to recover damages in the sum of \$6,125 for personal injuries alleged to have been sustained by him as the result of the negligence of the defendant while the relation of master and servant existed between them. The record before us shows that at the conclusion of the plaintiff's case the defendant moved for a directed verdict. The court sustained the motion and directed the jury to return a verdict for the defendant. Upon the verdict so ordered and returned judgment was entered accordingly. Whether the or-

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der of the court directing the verdict was correct or not, is the sole question brought here by the writ of error.

At and prior to the time of the accident which occasioned the injury to the plaintiff complained of in this action, the defendant was the owner and operator of a sugar plantation at Lahaina, Maui, with a sugar mill, railroad tracks, cars, engines and a machine shop thereon. In the conduct of its business the defendant operates and runs its cars and engines in carrying its employees to and from their work, in hauling cane to its mill, and in transporting wood, lumber and other material to different places on its plantation.

The plaintiff, prior to his employment with the defendant, had worked for the "Kahului Railroad" over three years in its shop, "sometimes go in the engine;" but he did not do any "switching or braking." With regard to his employment with the defendant, commencing with the last week in September, 1908, and continuing to about the end of December of the same year, except for a few days, he was variously employed in and about the machine shop, oiling cars, braking on the yard engine, braking on the cars, and working at night in the yard. On January 3, 1909, the day on which the accident occurred, he went to work on the cars as a regular brakeman. The engine and cars, as well as the work in which they were being used, were under the supervision of the engineer in charge,—he and the plaintiff being the only persons engaged in this work.

With regard to the accident the plaintiff testified on direct examination as follows:

"Q. What occurred, if anything, after you went to work that day?

"A. I went brakeman and we took some men up to half way to Puukolii.—Japanese men. Then we were shoving cars and he told me to get in front to watch the track in case of track wrong. So I stayed in front with the lantern. We took the men up and come back. We got to the mill and went out to the pump,—Lahaina pump. We went out and brought some oil to the pump. Come back to the yard and stayed about half

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an hour. Then we went down to the landing, Kaanapali landing and got some lumber. We went down and brought it back. We got back to the yard and then went to have our lunch.

"Q. What time was that?

"A. About twelve o'clock. Then I came back to the engine. After that the engineer come and we went down to Kekaa. On the way down we went to get cane on the other side of Kaanapali.

"Q. On leaving the yard, just after having your lunch, what was there besides the engine you were taking?

"A. Flat car behind to carry ropes and tools in case of any accident.

"Q. What were you doing after leaving the yard, before you got down to the place?

"A. I and the engineer got on the engine and went off. On the way, close to Kekaa, we met about fifteen cars. About eight cars loaded with wood. Koreans were filling up wood in the cars,—some cars with nothing. He stopped and told me to couple up the cars. I went to couple the car and then he told me to go in front and as soon as we get close to the switch jump down and run and fix the switch. I told him 'Alright; you come slow with the engine. Don't come too fast.' When I got ahead and gave him the signal, he blew two whistles and come ahead. About one hundred or two hundred feet from the switch the train was going about eight miles an hour about fast as ordinary horse traveling with a hack, I thought I could make it. I jumped and my foot slipped. The car hit me on the back and threw me on the track. I yelled out to the engineer. Then the car dragged me about thirty feet and run over my leg. I laid alongside the track then he came up to me. When he came he saw me lying down. I told him to take me to the hospital. Then he took me to the hospital."

On cross-examination the plaintiff testified as follows:

"Q. Now, you say that the cars were running about eight miles an hour, how do you know? How could you tell?

"A. He was going pretty fast, and my foot slipped.

"Q. You thought the train was running alright, didn't you and that you could get off?

"A. Yes.

"Q. You thought you were akamai enough?

"A. Yes.

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"Q. And if you had not slipped you would have been alright?"

"A. Yes.

"The Court: How was that?"

"A. My foot slipped.

"Q. If your foot had landed alright, you would not have slipped?"

"A. Yes.

"Q. You thought you were alright and that you could make it, didn't you?"

"A. Yes."

The plaintiff was the only witness who testified as to the accident.

It is urged on behalf of the plaintiff that he and the engineer were not fellow servants, but that the latter was his superior, occupying the position of vice principal. In the view we take of the case it will not be necessary to decide this question. Assuming, however, but only for the purposes of this case, that the engineer was vice principal, we fail to discover, upon a careful examination of the record, any evidence tending to show that the plaintiff's injury was caused by the negligence of the defendant.

To maintain his action it was incumbent on the plaintiff to show affirmatively a neglect of some duty on the part of the defendant, which it owed to him while he was employed in its service, and which was the sole and proximate cause of the injury complained of. The mere fact that the plaintiff was injured while in the service of the defendant raises no presumption that the injury was the result of negligence on the part of the defendant. "On the contrary in all such actions, in the absence of definite proof of some negligence which directly or naturally results in injury to the employee, the accident is regarded as one of the hazards of the employment of which the servant takes the risk and for which there can be no recovery." *Mensch v. Pa. R. R. Co.*, 150 Pa. St. 598, 606; 29 Cyc. 589, 644; *Labatt, Master and Servant*, §§3, 261, 263, 265.

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It being the established rule, that when one enters the service of another he assumes the usual and ordinary risks incident to the employment, and the burden being on the plaintiff to prove affirmatively the alleged negligence of the defendant, and there being an absence of such proof, it follows, therefore, that the injury complained of must be held to have been one of the usual and ordinary risks incident to the employment, which the plaintiff assumed when he entered the service of the defendant, and for which there can be no recovery.

The plaintiff at the time of the accident was about twenty-two years of age, and in view of his prior experience in and about machine shops and with engines and cars, though limited, it must be assumed, that when he entered upon the duties as brakeman, he knew the hazards attending his vocation. Thus viewing the case it is apparent that it was the duty of the court at the close of the plaintiff's evidence, to take the case from the jury and direct a verdict for the defendant.

Referring to the plaintiff's testimony, as quoted above, it will be observed that when the engine came "close to Kekaa," they stopped to couple up some cars, when, as the plaintiff says: "I went to couple the car and then he told me to go in front and as soon as we get close to the switch jump down and run and fix the switch. I told him 'Alright; you come slow with the engine. Don't come too fast.' When I got ahead and gave him the signal, he blew two whistles and come ahead." The plaintiff's contention is that this direction under the circumstances constituted negligence and that he, the plaintiff, had no alternative but to obey and jump. It is clearly apparent that there was no element of negligence in the direction of the engineer. When he said, "go in front and as soon as we get close to the switch jump down and run and fix the switch," it is clear that he could have only intended to run the cars, not only slow enough to permit the plaintiff to jump off with safety, but also slow enough to permit him to run ahead and have sufficient time to stop and fix the switch before the cars would reach the

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switch. No other reasonable construction can be placed upon the language used, and the plaintiff must have so understood it. It will also be observed that the engine and cars were not in motion at the time this "command" was given; and of course, the plaintiff, unlike the plaintiff in *Patton v. W. N. C. R. Co.*, 1 S. E. 863, cited by the defendant, was not required "to jump from a rapidly moving train of cars," nor was he expected or required to act suddenly and "without hesitation." He gave the signal to start and told the engineer to "come slow," and when he tells us that "the train was going about eight miles an hour" when he jumped, could the jury have said, and can we now say, in the absence of any evidence to the contrary, that the engineer did not "come slow?" We think not. The plaintiff was practically master of the situation; he was left free to exercise his own judgment as to the time and place and when and where to jump. There is no evidence that the rate of speed was too high for safe jumping by brakemen, or that it was higher than is customary when ordinarily careful and prudent brakemen jump. The plaintiff's own acts and his testimony show that his judgment at the time was that the cars were going slowly enough, not only to permit him with safety to alight, but also slowly enough to give him ample time to reach the switch and adjust it before the cars would reach him.

The plaintiff also fails to point out any defect in the cars, engine, tracks, or appliances essential to a reasonably safe and proper operation of them; or that they were in any way improperly or unskilfully operated; or that there were not a sufficient number of employees to carry on the work with reasonable and ordinary safety; or that the engineer in any way failed to properly or skilfully perform his duty. If the defendant in any of these respects, or otherwise, were remiss in any of its duties, which it owed to the plaintiff, the failure of which resulted in the injury complained of while he was engaged in the service of the defendant, it was for him to show this by competent evidence. Having failed to adduce such evidence, we

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must assume that the defendant performed its duty. The plaintiff undertook to trace the injury to the negligence of the defendant, and since he has failed to show such negligence, which was the sole and proximate cause of his injury, he cannot recover.

The injury, however unfortunate it was for the plaintiff, must be considered an accident only, for which there is no relief. There was nothing for the jury to consider. The order directing a verdict for the defendant was correct.

The judgment of the circuit court is affirmed.

G. A. Davis (*Atkinson & Quarles* on the brief) for plaintiff.

C. C. Bitting (*Thompson, Clemens & Wilder* on the brief) for defendant.

TERRITORY OF HAWAII v. HENRY N. CLARK.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 10, 1911.

DECIDED FEBRUARY 16, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

EMBEZZLEMENT—*county employee—second clerk of district court of Honolulu—indirect consent of county to entrusting him with bail money.*

Bail money forfeited in the district court of Honolulu belongs to the county and when collected by the second clerk of the district court, appointed by the magistrate and by him charged with the duty of collecting, is subject to embezzlement by the clerk as a county employee entrusted with the custody of the money by the indirect consent of the county.

The second clerk is properly appointed by the magistrate and not by the mayor under the provision in the County Act for the appointment of county officers, and may be lawfully charged by the magistrate with receiving bail moneys.

OPINION OF THE COURT BY HARTWELL, C. J.

The defendant was indicted for embezzling \$285, bail money forfeited in the district court of Honolulu, the property of the

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City and County of Honolulu, with which, he being an employee of the City and County, to-wit, second clerk of the district magistrate, and charged by appointment of the magistrate with the duty of collecting and receiving the aforesaid bail money, was entrusted by consent and authority of the City and County.

The defendant demurred to the indictment on the grounds, in substance, as follows: (1) that it does not show that the money was the property of the Territory or of any political or municipal corporation thereof; or (2) that the City and County of Honolulu is a political or municipal corporation or subdivision of the Territory; or (3) that the defendant is a public officer who by law, regulation or appointment by law is charged with the safe-keeping, transfer or disbursement of any money belonging to the Territory or any political or municipal corporation or subdivision thereof; (4) that there is no law authorizing or imposing the duty upon the second clerk of collecting and receiving fines and costs and other money on account of the City and County, or which prescribes a second clerk of the district court who is by law charged with the duty of collecting or receiving money on account of the City and County; (5) that the district magistrate is the only person having authority or charged with the duty of receiving or paying such moneys on account of the City and County; (6) that there is no law for the appointment of a second clerk or charging him with the safe-keeping of the public money or imposing upon him the duty or authorizing him to receive the same.

The trial court reserved for the consideration of this court the question whether the demurrer shall be sustained.

In argument the defendant abandoned the second ground of his demurrer.

We will first consider the defendant's contention that under Act 152 S. L. 1909, the magistrate could not impose upon the second clerk of his court the duty of receiving this money, Sec. 1 of the act reading as follows: "All moneys paid for costs in

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civil cases, and for fines and costs in criminal cases which shall be received or collected by any district magistrate in cases in which no appeal has been taken and perfected to the Circuit or Supreme Court, and all moneys paid for fines and costs which shall be received or collected by any sheriff, deputy sheriff, or police officer upon any mittimus, execution or other writ issued by such magistrate, including bail moneys forfeited, in any district court, shall be paid by the magistrate or other officer who shall have received or collected the same to the treasurer of the county in which such magistrate or officer has jurisdiction, and shall be accounted for by such treasurer as a county realization." The act requires all money from fines, etc., received by the magistrate and officers named to be by them paid to the county treasurer but does not in terms require all such money to be paid to them. There is nothing then as far as this act is concerned which makes payment to the magistrate's clerk illegal or even unlawful or which precludes the magistrate from directing payment to the clerk rather than to himself personally, a course which conforms to the practice that money payable to the court for fines, etc., is handed to the clerk.

In *Territory v. Wright*, 16 Haw. 123, the defendant was indicted under Secs. 157 and 158 P. L., being in substance the same as Secs. 2965 and 2967 R. L., the latter section having been amended to include embezzlement of county money. He had been employed in the office of the superintendent of public works as chief clerk and clerk of market, receiving his appointment from the superintendent, the legislature having made an appropriation for salary of chief clerk of market. His contention that his employment was not authorized by law and that no law authorized the entrusting him with the public money was not sustained. It was held (128) that the defendant was not the employee of the superintendent but a territorial employee within the class designated in Sec. 158 P. L., and that the statute did not require for the offense of embezzlement of public funds that "there shall be an express statute authorizing his

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employment in the capacity mentioned" nor "an express statute authorizing him to be entrusted with the money," and further (131) that the statute was "broad enough to include, and we think that it does include any territorial employee of the class designated in that section who is in fact entrusted with the custody of public money;" also that "the consent or authority of the Territory for entrusting public money to the defendant while employed as chief clerk of the department of public works may be either direct or indirect." These rulings were made independently of the provision of Sec. 29 of the Audit Act of 1898 making the defendant a public accountant, viz: "All persons who, by any law, regulation or appointment are now, or shall hereafter, be charged with the duty of collecting or receiving revenue or other moneys on account of the Hawaiian Government." With reference to this statute the court said (132): "There is no requirement of statute that the appointment to receive public money shall be explicitly provided for or authorized by statute," and "The evidence that the superintendent placed the defendant in charge of the public money in the office is equivalent to appointing him to do so." In *Territory v. Richardson*, 16 Haw. 358, the defendant was indicted for embezzlement while employed in the department of public works as clerk of the Honolulu waterworks and by law, regulation and appointment charged, as such clerk, with the safe-keeping of money belonging to the Territory. The court held (362): "The defendant could be charged by regulation or appointment as well as by law with the safe-keeping, transfer or disbursement of moneys," and further, "Nor do we think that the statute which prescribes the duties of the superintendent of waterworks would prevent the clerk of the waterworks from being charged by regulation or appointment with the safe-keeping, transfer or disbursement of moneys." The principles upon which the foregoing rulings were made are equally applicable to the present case in which embezzlement of county funds is

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charged to have been made by the defendant as a county employee.

In *U. S. v. Smith*, 124 U. S. 525, a case much relied upon by the defendant, it was held (532) that a clerk in the office of the collector of customs, appointed by the collector and holding his position at the will of the collector, "discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute," and that in the absence of any act of congress "making a clerk of the collector a fiscal agent of the government and bringing him within the class of persons charged with the safe-keeping of any public moneys," the clerk was not indictable for embezzling such money. The case was also relied upon, together with *Moore v. State*, 53 Neb. 831, and *State v. Meyers*, 56 Ohio 340, both of which are cited by the defendant in the present case, in *Territory v. Richardson*, supra, which held that these cases were not in conflict with the ruling that "the defendant could be charged by regulation or appointment as well as by law with the safe-keeping, transfer or disbursement of moneys." In *U. S. v. Smith*, the indictment alleging that the defendant was "charged by an act of congress with the safe-keeping of the public moneys," the only question presented was whether there was such an act. The rulings in the *Wright* and *Richardson* cases are conclusive against the defendant's claim of exemption from liability on the ground that no statute authorized the magistrate to impose upon his second clerk the duty of collecting fines, etc., or authorizing the employment of the second clerk in charge of such money. We are unable to sustain the defendant's contention that as no statute authorized the magistrate to appoint a second clerk, for whose salary the legislature in Act 122, S. L. 1909 appropriated a monthly salary of \$85 to be paid by the county, the clerk should have been appointed as a county officer under Sec. 81, Act 118 S. L., 1907, Incorporating the City and County of Honolulu, which requires that "The Mayor, with the approval of the Board of Supervisors shall appoint all officers of the City and County

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whose election or appointment is not otherwise specially provided for in this charter or by law." Ordinarily, if not otherwise expressly provided by statute, courts appoint and remove their own clerks, and by statute this is done in all the courts of the Territory unless the case of the second clerk of the district magistrate of Honolulu, because not expressly provided for in the same way, is to be regarded as an exception. There is no reason, we think, to infer that the legislature intended that the sole exception should be this second clerk and that he should be appointed and removable as a county officer. It is true that he performs certain service for the county in county matters in which the magistrate has jurisdiction and for the Territory in territorial matters within the jurisdiction of the magistrate, and also that he is paid by the county, but this is true of employees working under a committee of the board of supervisors in charge of roads, bridges, etc., and yet those employees of the county are not regarded as county officers. *Coster v. Trent*, 19 Haw. 352.

But the defendant urges that being appointed by the magistrate of the district court, which is a territorial and not a municipal court, he cannot be charged as an employee of the county under Sec. 2967 R. L., reading as follows: "Whoever, being an officer or employee of the Territory or of any political or municipal corporation or subdivision thereof, is guilty of embezzlement of any money, note, or other effects or property belonging to the Territory or to such political or municipal corporation or subdivision thereof shall be punished by imprisonment at hard labor for not more than ten years, or by fine not exceeding five times the value of the thing or property embezzled."

In taking the forfeited bail money by direction of the magistrate, as alleged in the indictment, "on account of the said City and County of Honolulu," he was not acting for the Territory but for the county and to that extent he was employed in the service of the county and is chargeable as its employee in respect of county funds placed in his charge for transmitting to

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the county treasurer. Sec. 2967 R. L. prescribes the penalty for embezzlement by any employee of the county of county funds while Sec. 2965 R. L. defines the offense as follows: "If any person who is intrusted with, or has the possession, control, custody or keeping of a thing of value of another, by the consent or authority, direct or indirect, of such other, without the consent and against the will of the owner fraudulently converts or disposes of the same, or attempts so to convert or dispose of the same, to his own use and benefit, or to the use and benefit of another than the owner or person entitled thereto, he is guilty of the embezzlement of such thing."

The defendant, in taking for and in behalf of the county, and by direction of the magistrate, the forfeited bail money which was the property of the county from the time of its forfeiture, was acting as the receiver, agent, bailiff or employee of the county in respect of that money, and although the county did not directly authorize this to be done, by accepting such money when paid to its treasurer it indirectly consented to the clerk being entrusted therewith, or rather, as such acceptance would require evidence, the lawfulness of the direction of the magistrate that the clerk should have the custody of the money of the county is presumed, as a matter of law, to have been acquiesced in or consented to by the county, the direction being lawfully given the consent to the custody follows. In the *Wright* and *Richardson* cases, supra, there was embezzlement of territorial money which had been entrusted to the clerk of waterworks, as a territorial officer, by the regulation or appointment of the superintendent of public works without statutory authority, and this, notwithstanding the fact noticed in *Superintendent of Public Works v. Richardson*, 18 Haw. 523, 525, which was an action on the official bond of the clerk, that "There is nothing in the designation of 'clerk' to warrant the inference that he was to act as assistant to the superintendent of waterworks in collecting water rates, nor do the ordinary definitions of 'clerk' include one entrusted with the collecting and handling of funds."

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In this case there is alleged to have been embezzlement of county money entrusted to the second clerk of the district court by direction or appointment of the district magistrate. The consent or authority of the Territory and of the county, respectively, in all these cases, being indirect, is presumed, as above stated, to have been given to a lawful custody of the public funds.

Cases are not in point, or else are against our precedents cited, in which the statute explicitly vested in officers other than the defendant the authority to collect fines or other public money, which by usage had been paid to the defendants, while our statute (Act 152 S. L. 1909), while recognizing the right of the officers therein named to collect the fines, etc., does not impose upon them the duty of doing so. When such fines, costs and forfeited bail money are collected, whether by the magistrate, who is a territorial officer, or by his second clerk and appointee, each of them acts in such case in a dual capacity, or one as a county officer and the other as a county employee. To construe the statute so narrowly that the defendant could not be held for embezzling this money of the county because he had not been specifically authorized by statute to collect the money or because the county had not explicitly entrusted him with it would be a miscarriage of justice, which we think is not required by principle or precedent.

The prosecution contends,—and there are decisions of eminent courts which support the contention,—that “One who has collected money under color of authority cannot defend against a prosecution for embezzlement on the ground that he was not authorized to collect it.” This appears to be the view which was taken in *People v. Hawkins*, 106 Mich. 479; *State v. O'Brien*, 94 Tenn. 79; *State v. Spaulding*, 24 Kans. 1; *State v. Pohlmeyer*, 59 Ohio 491; *Ex Parte Ricord*, 11 Nev. 287; *State v. Findley*, 101 Mo. 217; 1 Wharton's *Crim. Law*, §1025; Bishop on *Statutory Crimes*, 3 ed., §271.

The doctrine of estoppel as thus set forth, when confined to

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the circumstances of the cases cited, commends itself to our judgment, but there is no occasion to invoke it in the present case, in which, for the considerations mentioned, we are of the opinion that the demurrer should be overruled and the circuit court so advised.

J. W. Cathcart, City and County Attorney, for the Territory.

A. A. Wilder and C. C. Bitting (Thompson, Clemons & Wilder on the brief) for defendant.

L. APANA, AS GUARDIAN OF THE PERSON AND PROPERTY OF LOO TAN CHEE (k) AND LOO SAN LAN (w), MINORS, v. J. P. KAPANO, GUARDIAN OF THE PROPERTY OF PULEWA (k) AND MAIEHA (w), MINORS, AND KAM SACK ON, KUM FO SING, CHUN YOUNG, CHUN LOY, CHEE NAM, LEE KUP, KAM YOUNG TAI AND CHEE SING, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF TONG WO WAI COMPANY AND WONG SAY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 16, 1911.

DECIDED FEBRUARY 20, 1911.

HARTWELL C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*deed—statement in, as to grantor's title.*

Statements in a deed as to the title claimed by the grantor do not render it inadmissible for the purpose of showing the defendants' claim in a defense of title by adverse possession.

TRIAL—*instructions—effect upon verdict when inconsistent with each other or inapplicable to proved or admitted facts.*

Instructions which relate to matters vital to the case and are so clearly inapplicable to the proved or admitted facts that if followed the verdict would be contrary to law cannot be otherwise than prejudicial and require reversal of the verdict.

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OPINION OF THE COURT BY HARTWELL, C.J.

This was an action of ejectment, resulting in a verdict for the defendants, brought to recover possession of 2 1-3 acres of land at Ewa, Oahu, part of the ili of Ohua awarded to Haalilio by L. C. A. 6545, confirmed by R. P. 5694, conveyed by Haalilio to John Hamauka by deed of May 13, 1878, recorded in book 54, pp. 430, 431, and by him conveyed to Loo Ngawk by deed of July 19, 1883, recorded in book 81, pp. 272-274. It was shown by probate records that Loo Ngawk died in China July 18, 1896; that plaintiff, as administrator of his estate, filed an inventory including the land in question; that Loo Ngawk left one son, Loo Wing Chew, who died in China December 8, 1898, leaving a son and a daughter, minors, for whom the plaintiff is guardian. The plaintiff's evidence showed that the land was included in the award and patent and that the defendant Wong Sai was in possession August 14, 1908, when the action was brought; that the defendant Kapano, guardian of the minor children, two of the defendants, had leased the land to the defendant Wong Sai. The plaintiff, by competent and undisputed evidence, showed a clear title in his wards. The defense relied solely upon adverse possession, beginning with one Kale who died in 1898, a witness for the defendant thinking she died in February, a witness for the plaintiff saying, "If my memory tells me right she died about October, the latter part of October of that year." Before her death Kale conveyed the land to her grandson Maieha by deed of September 10, 1897, received for record September 21, and recorded in liber 172 on pp. 299, 300. Maieha died in 1899 and the defendant Kapano was appointed guardian of the property of his minor children, Pulewa and Maieha.

The plaintiff excepted to the admission in evidence of this deed to Maieha, to which he had objected, on the grounds (1) that "it does not appear that that is the land involved in this action which passed by that deed," (2) "as it has self-serving

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declarations," and (3) "it is not proved that Kale had any land to convey." The deed recites as its considerations the receipt from the grantee of \$50, "my great affection for my own grandchild," and "his proper care of me in all things for my benefit while I was—arising from my being blind," and conveys to the grantee in fee, besides other land, the land which is in controversy, which is described in the deed by metes and bounds as "apana 1 of L. C. A. 6545 to Haalilio," and as containing 2.12 acres. The following is the declaration in the deed objected to as self-serving: "This is a piece of land given to me on account of having lived or occupied it for a long period, more than twenty years in accordance with law, and more than forty years up to the present time, and that this land is my own."

The plaintiff relies on the ruling in *Makekau v. Kane*, 20 Haw. 203, 208, disallowing the defendant's question, in an action of ejectment, to a witness who had been in the employ of the defendant's grantor, whether he did "hear any statements ever made by Kimo as to who owned the land." The court, in overruling the exception to the disallowance of the question, said: "In the first place it does not appear that it was offered for the sole purpose of giving character to the possession, and in the second place the witness' attention was not called specifically to the time when Kimo was in possession. In answer to the question as stated the witness could well have testified to declarations made when Kimo was out of possession. Nor was any offer made by the defendants to prove by the witness that the declarations were made by Kimo while he was in possession or that they were of a claim of ownership in himself or such as to show that his possession was hostile to the title of the true owner." The exception to the granting of the plaintiff's motion to strike out the evidence of the witness that Kimo had told him that he had paid the taxes and collected the rents and profits during his lifetime was overruled as "a mere narration of past occurrences and inadmissible." On the other hand, in *Carter v. Iulia*, 16 Haw. 630, also an action of ejectment in which the

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defense was adverse possession, a statement of the defendant, while in possession of the land, made to the lessor of "a piece of land near and perhaps including a part of the land in dispute," whose lessees, in attempting to cultivate a portion of the land in dispute, had been driven off by the defendant, in response to an inquiry by the lessor why she had put his tenants off, that "the property was hers and that David Baker (the lessor) had no right to it," was held to be admissible.

The distinction between the two cases is clear. In the present case the statement in the deed was made by the grantor at the time of its delivery and while in possession of the land and has no more nor less significance than the statements which frequently appear in conveyances of the source of the grantor's title, "being the same premises," etc., which, although in no sense evidence of the title, do not render the deed inadmissible as a whole. An instruction, if asked, would properly have been given to the effect that the recital was merely evidence of the fact that the claim of ownership was made by the grantor and was "not offered except as coloring the occupation, for which purpose it was admissible." 3 Wigmore on Evidence, §1778. Perhaps the deed describes the land substantially as it is described in the complaint, but in view of the conclusion we have reached in the case it is unnecessary to say whether the record shows that the land was sufficiently identified with that which is claimed by the plaintiff.

The plaintiff excepted to the following instructions given at the defendants' request, namely, (1) "The law assumes that those in possession of land are rightfully in possession, and those who claim that the persons in possession are unlawfully in possession must satisfy the jury by preponderance of the evidence that they have a good title and a better title than the defendants. The Plaintiffs must recover upon the strength of their own title;" (2) "The Court instructs the jury that although they may believe from the evidence that the land in controversy is covered by the deed under which the Plaintiffs claim, yet if

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they further believe from the evidence that the defendants and those under whom they claim have been in the honest, peaceable, continuous and adverse possession of said land, paying taxes on the same, under color of title, for Ten Years prior to the institution of this suit, they must find for the Defendants;" (3) "Conveyances of land by one in possession are evidence of the hostile character of his possession;" (4) "The right of the plaintiffs to recover in this case rests on the strength, of their own title, and they cannot recover by showing defects in the title of the defendants;" (5) "Holding land under a parole gift of a fee of the land for ten years will give a title by adverse possession, if it is open, notorious and undisputed;" (6) "Where the adverse claimant has remained in the continuous adverse possession of the land for the full statutory period necessary to operate as a bar to the recovery of possession by the owner the former acquires a valid title to the land, and a subsequent break in his actual possession does not in any way affect his right; the continuity of possession has reference to the time the statute is running and is not necessary after the bar has attached."

These are the usual instructions in actions of ejectment in which the defendant seeks to invalidate the plaintiff's title and does not attempt to show an independent title in himself by adverse possession, whereby he takes an affirmative position placing upon him the burden of proof. *Kaaihue v. Crabbe*, 3 Haw. 768, 774. It is true that at the request of the plaintiff the court correctly instructed the jury: "The plaintiff in this case has shown you by a direct chain of paper title that he is the owner of the land described in the complaint; those documents are prima facie evidence of their contents and would vest the title in the plaintiff subject to any adverse possession which the defendants might have shown you. Where the occupation of the land has been with the permission of the owner, in order that adverse possession may begin to run it is necessary that some direct notice be given to the owner that the occupier is holding hostile to him." But the instructions numbered above,

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1 and 4, are entirely inapplicable to a defense of adverse possession in which the plaintiff's record title is shown and is not disputed by the defendants. The effect of inconsistent or conflicting instructions was considered in *Territory v. Richardson*, 17 Haw. 231, 237, a case of trial upon an indictment for embezzlement in which instructions applicable to an action of trover for wrongful conversion of money were held not to be nullified or cured by instructions appropriate to the case, and although in the opinion on the motion for a rehearing in *Sylva v. Wailuku Sugar Co.*, 19 Haw. 602, 682, the court said, "it may be that the opinion of the majority of the court in the present case states the rule about conflicting instructions in broader language than can be reconciled with the ruling in *Territory v. Richardson*," the decision in the *Richardson* case has never been questioned and is a precedent which requires the verdict in this case to be reversed. It is not every instance of inconsistent instructions which justifies reversal, but when, as in this case, they relate to matters vital to the case and are so clearly inapplicable to the undisputed or admitted facts in evidence that if followed by the jury its verdict would be contrary to law, the error cannot be otherwise than prejudicial.

Exceptions sustained, verdict reversed, new trial ordered.

A. A. Wilder (*Thompson, Clemons & Wilder* on the brief) for plaintiff.

W. C. Achi for defendants.

NO. 35. *L. L. McCANDLESS v. MARSTON CAMPBELL*, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII. Appeal from Circuit Judge, First Circuit. Decided February 21, 1911. Hartwell, C.J., Perry and De Bolt, JJ. Mandamus to compel respondent to grant petitioner's application for leave to connect certain premises with the public sewer. Demurrer to petition over-

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ruled by trial judge and interlocutory appeal allowed. Per curiam: The petition contains the assertion that sections 1036 and 1037, R. L., are unconstitutional. The question of unconstitutionality was not discussed in any of the briefs or in the oral argument of the deputy attorney general, the parties taking the view, apparently, that the assertion in the petition was, like an allegation of fact, binding upon the court for the purposes of the demurrer. The statement in question is purely of a conclusion of law and does not bind the court. If it becomes essential to a disposition of the appeal, the issue of the alleged unconstitutionality will be considered and decided. Further time is allowed the parties for the filing of briefs and the presentation of oral argument on the subject.

W. S. Edings and P. L. Weaver for plaintiff.

E. W. Sutton, Deputy Attorney General, for defendant.

NO. 28. TERRITORY OF HAWAII *v.* HENRY N. CLARK. Reserved Question from Circuit Court, First Circuit. Petition for Rehearing. Filed March 7, 1911, Decided March 14, 1911. Robertson, C.J., Perry and De Bolt, JJ. Per curiam: The first ground of the petition is "that through inadvertence counsel for defendant failed to make clear to the court their point that while there may be some show of authority for the district magistrate to direct payment to the first clerk of the district court, for which clerk the law provides, there is no recognition by law of a 'second clerk' to whom such questionable authority can be delegated." This point was clearly presented both in the brief and at the oral argument and is decided in the opinion filed. The fourth ground is that the court misunderstood the contention of the defendant as to the specific embezzlement charged and failed to appreciate that that contention was, not that the defendant could not be convicted at all, but that he could not be convicted upon the facts as charged in the indictment. The opinion expresses our un-

Territory v. Clark, 20 Haw. 405.

derstanding that the questions involved, arising upon demurrer, related solely to the facts as charged in the indictment. The second, third and fifth paragraphs of the petition do not state any recognized ground for a rehearing. They are mere assertions that the law is to the contrary of what has been decided. The petition is denied without argument under Rule 5.

*J. W. Cathcart, City and County Attorney, for the Territory.
Thompson, Clemons & Wilder for defendant.*

HANS TORSON v. GEORGE C. BECKLEY, JR.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 10, 1911.

DECIDED MARCH 21, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*spontaneous exclamations—statement of opinion.*

In an action for damages for negligence in the operation of an automobile testimony was offered tending to show that one who witnessed the collision exclaimed shortly afterward that (referring to the plaintiff), "It was all his own fault and if he had taken our advice and had been careful the accident would not have happened." Held, that even though in other respects admissible the statement was the expression of the mere opinion and conclusion of the declarant and was therefore inadmissible.

APPEAL AND ERROR—*instructions—record on exceptions.*

Ordinarily the inclusion in the record of a copy of the charge of the presiding judge to the jury is essential to the consideration of exceptions to the giving or the refusal of instructions.

OPINION OF THE COURT BY PERRY, J.

This is an action for damages for negligence. The plaintiff's claim is that on May 23, 1909, he was with two companions returning on horseback from Waikiki towards the center of the city, that when at a point on King Street near the government nursery and while riding "very slowly" on his right hand side of the road an automobile operated by the defendant and going

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"like a streak of lightning" suddenly swerved from the latter's right hand side of the available roadway to the plaintiff's right and endeavored to pass between the plaintiff and the sidewalk on the upper side of the street, and that a collision followed resulting in serious physical injury to the plaintiff; that at the point in question substantially the lower half of King Street was at the time undergoing repairs and closed to traffic by the presence of certain wooden horses; that the unobstructed part of the street was about nineteen feet in width and that the collision was due to the defendant's negligent operation of his automobile. The defendant's claim, on the other hand, practically conceding the condition of the roadway to be as described in the evidence for the plaintiff, is that his automobile was proceeding eastward on his (the defendant's) right side of the unobstructed part of the roadway at the rate of about sixteen miles an hour and that plaintiff was riding towards him on the same side of the road; that the defendant, after observing the plaintiff, continued for a few moments on the same side of the road, expecting the plaintiff to turn to the upper side as required by law; that finding that the plaintiff would not, apparently, turn to his right and would, if the positions remained unchanged, collide with the front end of the automobile, defendant turned suddenly to the left in the hope of thus avoiding a collision but did not succeed in doing so and the fall resulted. There was evidence sufficient to support a finding in accordance with either of these theories and perhaps also a finding to the effect that shortly before reaching the automobile the horse shied and threw the plaintiff to the ground in front of the machine and that it was thus, and not otherwise, that the injuries were received. One of the plaintiff's witnesses gave evidence by deposition to the latter effect. The jury returned a verdict for the plaintiff in the sum of one thousand dollars.

By cross-examination of Asch, a witness for the plaintiff, and by direct evidence for the defendant the defendant offered to prove that within a few moments after the fall and while the

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plaintiff was lying on the ground with a broken leg and a broken arm, bleeding and helpless (the plaintiff testifies that he was unconscious)the plaintiff's two companions said that "It was his own darned fault," and again, that one of them was "talking to him and stating to him that it was all his own fault and that if he had taken their advice and was careful the accident would not have happened," or words to that effect. The evidence was disallowed apparently on the ground that the exclamations were made after too great a lapse of time and were disconnected with the accident itself and a mere narrative of a past occurrence.

It may be assumed that to the rule excluding hearsay testimony an exception is recognized which admits "statements or exclamations by an injured person, immediately after the injury, declaring the circumstances of the injury, or by a person present at an affray, a railroad collision or other exciting occasion, asserting the circumstances of it as observed by him" (3 Wigmore, Evidence, Sec. 1746), on the ground that the circumstances attending or giving rise to the utterances are such as to give to them the same degree of trustworthiness which would have been secured by placing the witness under oath. *Ib.*, Secs. 1748, 1749; *U. S. v. King*, 34 Fed. 302, 314; *Ins. Co. v. Mosley*, 8 Wall. 397, 408. It may be further assumed that it is not indispensable that the declaration be made during the occurrence of the main event but that it is sufficient if it is so connected therewith as to constitute a part of it and is near enough in time to allow the assumption that it was uttered under the same exciting influence. *Carr v. State*, 43 Ark. 104; *State v. Murphy*, 16 R. I. 528, 533. See also 3 Wigmore, Evidence, Sec. 1756; *Waldele v. R. R. Co.*, 95 N. Y. 274, 283; *Leahey v. R. R. Co.*, 97 Mo. 172; *R. R. v. Baier*, 37 Neb. 235; *R. R. v. Coyle*, 55 Pa. St. 396, and *Com. v. Hackett*, 2 Allen 136, 139, 140.

Still, even if the circumstances in the case at bar were such as to render the statements in question in other respects admissible, they were inadmissible because at best they constituted

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the expression of the mere opinion and conclusion of the declarants. They would have been inadmissible even if testified to by the plaintiff's companions under oath at the trial. "It was all his own fault" was a conclusion upon the ultimate issue which the jury was impanelled to try; and so, also, was the statement, indirectly made, that the plaintiff had not been "careful" and that the collision would not have happened but for his carelessness. The statements were the equivalent of an assertion that the plaintiff had been guilty of negligence. Whether the plaintiff was negligent was a question to be determined by the jury upon the facts as disclosed by the evidence and the law as stated to it by the court. The facts were capable of being stated to the jury by the witnesses and it was within the province of the jury alone to pass upon the ultimate question of negligence or absence of negligence. On this general subject, see, for example, *Boone v. Transit Co.*, 139 Cal. 490, 492 493; *Carr v. State*, 76 Ga. 592, 596, 597; *Meyer v. R. R.*, 30 N. Y. Supp't. 534, 536; *R. R. v. Lee*, 51 S. W. (Tex.) 351, 352.

Seven of the exceptions are to the giving of certain instruction and the refusal of others. As to them it is sufficient to say that the court's charge as a whole has not been made a part of the record and that it is therefore impossible to determine that the rulings were erroneous. It may be that the charge as given rendered it unnecessary to grant the instructions the refusal of which is complained of and cured any possible error in the giving of the others. In the absence of any showing to the contrary the presumption is that the instructions given were correct and sufficient.

Against the defendant's objection a copy of Ordinance No. 5 of the City and County of Honolulu was received in evidence. It was offered "as a circumstance to be considered by the jury in determining the degree of negligence." Section 14 of the ordinance provides that no person shall operate a motor car within certain prescribed geographical limits (the collision occurred without the limits) at a rate of speed greater than fifteen miles

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an hour "nor either within nor without said area at a speed greater than is reasonable and proper, having regard to the width and grade of the highway, the grade of adjoining declivities and the traffic and occupation of the highway by others, or so as to endanger the life or limb of any person or the safety of any property." As to the locality involved in the case the rule prescribed by the ordinance was not different from that which would obtain in its absence. Even if, therefore, the evidence was not admissible, the error was not prejudicial.

On re-direct examination one of the plaintiff's witnesses, after testifying concerning plaintiff's companions, "I judge from the remarks they made they were companions of the man," answered in the affirmative the question, "And judged from their actions they were partly under the influence of liquor?" On re-cross examination the court disallowed the question, "What were these remarks which they made to lead you to the inference that these men were partly intoxicated?" The ruling was correct. Whether plaintiff's companions were under the influence of liquor was immaterial to the issues under investigation, the evidence of exclamations made by them having been excluded.

All of the exceptions, whether in this opinion specifically referred to or not, are overruled.

G. A. Davis (*A. L. C. Atkinson* on the brief) for plaintiff.

C. C. Bitting (*Thompson, Clemons & Wilder* on the brief) for defendant.

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L. L. McCANDLESS v. MARSTON CAMPBELL, SUPER-
INTENDENT OF PUBLIC WORKS OF THE TER-
RITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 9, 1911.

DECIDED MARCH 24, 1911.

ROBERTSON, C.J. PERRY AND DE BOLT, JJ.

CONSTITUTIONAL LAW—*delegation of powers.*

It is an established general doctrine of constitutional law that the power conferred upon the legislature to make laws cannot be delegated to any other authority.

SAME—*taxing power—health regulations.*

The power of taxation may not be delegated to administrative officers. The power to enact health regulations, having the force of law, may be delegated to municipalities and local boards of health.

TAXATION—*sewer rates, a tax.*

The sewer rates provided for by section 1036 of the Revised Laws, in view of the provisions of ordinance No. 6 of the City and County of Honolulu and the plumbing regulations of the board of health constitute a tax, and are, therefore, subject to the principles which govern the imposition and assessment of taxes.

SAME—*illegal delegation of power.*

Sections 1036, 1037 and 1038, Revised Laws, in so far as they relate to the imposition, assessment and collection of rates for the use of the public sewers in the City and County of Honolulu constitute an illegal delegation of the taxing power, and are invalid.

MANDAMUS—*remedy by.*

Mandamus lies to compel the superintendent of public works of the Territory of Hawaii to grant the application of a property owner for permission to connect his premises with the public sewer when such owner has complied with all legal requirements to entitle him to connect, and no valid reason is shown for a refusal to issue the permit.

OPINION OF THE COURT BY ROBERTSON, C.J.

In a petition for a writ of mandamus before a circuit judge of the first judicial circuit, it was alleged that the petitioner is a resident citizen of the Territory of Hawaii, and the owner of a building and the land upon which it stands, situate on the

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corner of Pauahi street and Nuuanu Avenue, in the City and County of Honolulu; that said building is accessible to the public sewer in said Pauahi street; that the respondent is the superintendent of public works of the Territory of Hawaii; that by section 8 of ordinance No. 6 of the said city and county, it is provided that, "in the construction, reconstruction or alteration of any building of any description, in which plumbing fixtures are to be placed all plumbing work shall be connected with the public sewer, when such sewer is accessible;" that section 30 of said ordinance provides that any person violating any of the provisions of the ordinance shall be deemed guilty of a misdemeanor, and shall be fined not exceeding five hundred dollars or be imprisoned not more than six months; that section 2 of the plumbing regulations of the board of health (which have the force of law) contains provisions to the same effect as those of section 8 of the aforesaid ordinance; that by virtue of the said ordinance and the said plumbing regulations of the board of health the connection of the petitioner's building is an involuntary act, and that the petitioner is compelled to connect his building with the sewer or abandon it; that the petitioner presented to the respondent, upon the printed form provided for the purpose, an application for permission to connect his building with the sewer, at the same time tendering the respondent the required fee; that the respondent refused to receive, act upon, or grant said application, alleging as his reasons for such refusal, the fact that the petitioner had erased from the printed application the words "and to pay such rates annually for the sewer as may be fixed," and that the petitioner had declined and refused to enter into any contract or agreement to pay such rates annually for the use of the sewer as may be fixed pursuant to the provisions of sections 1036 and 1037 of the Revised Laws of Hawaii; that those sections of the Revised Laws are illegal and unconstitutional, because, in brief, that they are void for uncertainty and leave the rates to be fixed by "guess work," that they constitute an act of spoliation under legislative

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form, attempt to create and impose double taxation, and are a void delegation of legislative power; that said sections are in conflict with the provisions of the Constitution of the United States requiring compensation to be made when private property is taken for public use, and declaring that no person shall be deprived of property without due process of law, and that they violate the provisions of the Fourteenth Amendment to the Constitution which, it is said, require equality and uniformity in taxation; it is also alleged that it was the duty of the respondent, as superintendent of public works, to grant petitioner's application; and petitioner prayed for the issuance of a writ to compel the respondent to act upon said application and to grant the same. A copy of the petitioner's application is attached to the petition. It shows, among other things, the number of fittings and the character of the plumbing in the petitioner's building; and in that part of the application which specifies the conditions to which the applicant agrees, under penalty of having the connection with the sewer severed, the clause providing for the payment of annual rates was expunged.

The respondent demurred to the petition and alternative writ on the ground that it was not shown that he was under any clear legal duty to receive, act upon or grant the petitioner's said application.

The demurrer was overruled, and the judge allowed an appeal to this court.

The circuit judge was in error in holding that the respondent, by his demurrer, admitted the alleged unconstitutionality of the statute. That a statute is unconstitutional is a matter of law. A demurrer does not admit such an allegation. Furthermore, no court should hold a statute unconstitutional simply because litigants have alleged and conceded it to be in conflict with the constitution. (Ante p. 404.)

Section 1036 of the Revised Laws provides that the rates of charges for the use of the sewer shall be fixed from time to time by the superintendent of public works, subject to the ap-

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proval of the governor, and "shall be fixed as nearly as reasonably may be, so that the entire yearly receipts shall not exceed the total yearly cost of maintaining and repairing the sewers together with the yearly interest on the bonds representing the cost of the sewer system." Section 1037, provides that these charges shall be paid semi-annually in advance. Section 1038, imposes a penalty for delinquency in the payment of the rates, and provides that they shall be a lien upon the property connected with the sewer. Section 1039, confers jurisdiction on the district magistrates to hear and determine all civil actions for the collection and payment of sewer rates and charges irrespective of the amount claimed.

Act 105 of the Session Laws of 1909, provides that all revenues derived from the Honolulu water and sewer works shall be used for the expenses of maintenance and operation of said works; the payment of interest on the indebtedness incurred in the construction, improvement and extension of said works; and that not less than ten per cent. of the yearly gross receipts shall be set aside for the payment of said indebtedness.

The City and County of Honolulu is authorized, by statute, "to make and enforce within the city and county of Honolulu all necessary ordinances covering all local police matters of sanitation, inspection of buildings, condemnation of unsafe structures, plumbing, sewers, dairies, milk, fish, cemeteries, burying grounds, interment of the dead and morgues and the collection and disposition of rubbish and garbage, and no ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or statutes of the Territory whether such ordinance is in conflict with any such statute or statutes or otherwise." Section 23, Act 118, Session Laws of 1907, as amended by Section 1, Act 99, Session Laws of 1909.

Section 8 of ordinance No. 6, of the City and County of Honolulu, enacted August 4, 1909, provides that all plumbing work in any building of any description shall be connected with -

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the public sewer where such sewer is accessible. The penalty provided for any violation of the ordinance is fixed at a fine not exceeding five hundred dollars or imprisonment in the city jail for not more than six months.

The board of health of this Territory is authorized to make such regulations respecting nuisances, sources of filth and causes of sickness as it shall judge necessary for the public health and safety. Penal Laws (1897), Sec. 870; Rev. Laws, Sec. 991. By a subsequent amendment (Act 42, Session Laws, 1905) such regulations require the consent of the governor. Such regulations must be published, and the penalty for their violation is fixed by the statute at a fine not exceeding one hundred dollars.

Section 2 of the plumbing regulations of the board of health, the enactment of which preceded that of the said sections of the Revised Laws, provides that "Every building of any description in which there are plumbing fixtures or in which plumbing fixtures are to be placed shall be connected with the public sewer where such sewer is accessible, and where there is no sewer accessible with a cesspool connected in accordance with the rules of the board of health."

In *Territory v. Brown*, 19 Haw. 41, it was held that an agreement made by the defendant prior to the enactment of the provisions now contained in sections 1036 to 1039 of the Revised Laws, by which the defendant agreed to pay to the superintendent of public works "such rates annually for the use of the sewer as may be fixed" was a valid and enforceable one.

It was there said (p. 43): "The case is not within the rule applicable to unauthorized assessments made upon owners or occupants of property abutting upon streets in order to obtain funds for defraying the expense of public improvements which benefit the property. The defendants' request for permission to connect the property with the sewer and their promise to pay for use of the sewer are not shown to have been required by any rule or regulation of the superintendent of public works or of the board of health. It was a voluntary offer which pre-

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sents the question whether, after its acceptance and the subsequent use of the sewer, the defendants can avoid the contract so made on the ground that it was illegal either as contrary to public policy or because it was *ultra vires*."

In *Territory v. Tue Bun*, ante p. 267, it was held that the defendant, who had voluntarily entered into the agreement required by the superintendent, was not in a position to question the validity of the demand for sewer rates. It was there pointed out that there was "no evidence that the defendant made the agreement for the payment of sewer rates from fear of being held liable for the penalty under the regulation of the board of health" (p. 269), and that "if he had seasonably made the objections which he now makes to the legality of the rates or to the constitutionality of the act his objections might have received consideration from the superintendent who would then have had an opportunity to be advised whether the objections were well taken, and in that event he might have applied to the legislature for an amendment of the law." (p. 271.)

In *McCandless v. Campbell*, ante p. 264, it was held, the validity of the legislation not then being questioned, that it was within the statutory powers of the superintendent to require an applicant for sewer connections to sign an agreement to pay such annual rates for the use of the sewer as may be fixed, as a condition precedent to the granting of permission to connect with the sewer.

In the view we take of this case it will be necessary only to deal with the contention which has been advanced on behalf of the petitioner that the provisions of the Revised Laws, above referred to, constitute an illegal attempt on the part of the legislature to delegate the power of taxation to the superintendent of public works.

It is an established doctrine of constitutional law that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority. Cooley's Constitutional Limitations (6th ed.) 137; 1 Watson on the Constitu-

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tion 117. To this general principle, however, there are some exceptions. One is that the legislature may delegate the power of taxation to municipal corporations. Cooley on Taxation (2d ed.) 63. And another is that the power to enact regulations concerning the public health may be delegated to municipal corporations or local boards of health. 4 Am. & Eng. Enc. Law 599. Though this latter has been held not to be a delegation of legislative power, but merely the providing of an agency for carrying out the legislative enactment. *Kirk v. Wyman* (S. C.), 65 S. E. 387, 389.

There is no provision in the act creating this Territory (31 Stat. L. 141) which expressly forbids the delegation of powers by one department of the government to another, but the application of the principle that powers cannot be delegated by those upon whom they have been conferred would seem to be required by the nature of the various powers, the terms used and the purposes for which they were bestowed, except in so far as through long practice the delegation of powers has become customary throughout the United States.

The legislature, in delegating the power to tax, can delegate it only to a municipality itself. It cannot confer it upon ministerial or administrative officers. Cooley on Taxation (2d ed.) 64; *State v. Mayor*, 103 Ia. 76; *Van Clere v. Sewerage Commissioners*, 71 N. J. L. 574, 583.

It has long been the practice in this country to invest boards of health with what seem to be legislative powers relating to matters affecting the public health, and, in this connection, to authorize the promulgation of rules and regulations which have for their object the protection of the public health and the prevention of disease. The validity of such legislation has been repeatedly affirmed. *Polinsky v. People*, 73 N. Y. 65; *People v. Vandecarr*, 175 N. Y. 440; *Salem v. Eastern R. Co.*, 98 Mass. 431; *Belmont v. Brick Co.*, 190 Mass. 442; *Blue v. Beach*, 155 Ind. 121; *State v. Kirby*, 120 Ia. 26; *State v. Zimmerman*, 86 Minn. 353.

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Immemorial usage and the necessities of local government fully justify the delegation of police powers of at least a minor nature to municipalities and local governing bodies.

It has been held that municipalities may, in the interest of the public health, compel property owners to connect their premises with the public sewer. *Com. v. Roberts*, 155 Mass. 281; *Hill v. St. Louis*, 159 Mo. 159; *Martin v. Hilb* (Ark.), 14 S. W. 94.

The validity of either the ordinance or the regulation of the board of health, above referred to, has not been questioned by counsel for either party. But we feel justified in holding, at least for the purposes of this case, that their validity cannot be successfully assailed. It is evident, therefore, that the petitioner's claim that his application for permission to connect his building with the public sewer is not a voluntary act, but one compelled by those laws, is well founded.

Counsel for the respondent has correctly pointed out that the petitioner's contention is based entirely upon the assumption that the sewer rates in question are a tax, and, in arguing that they cannot be regarded as a tax, he relies largely on the former decisions of this court which have been above noticed, and on the case of *Richards v. Ontai*, ante p. 335.

The question whether these sewer rates constitute a tax is one of much difficulty, and we believe it has not been decided so far as its present application is concerned by any of the cases referred to. We have been referred to no case, and have found none, which could be regarded as a controlling authority on the question here presented.

In *Richards v. Ontai*, it was decided merely that sewer rates were not to be regarded as taxes within the terms of a lease providing that the lessor should pay the "taxes" on the demised premises and that the lessees should pay "all other charges."

The case of *Jones v. Commissioners, etc.*, 34 Mich. 273, was also cited. It was there said (p. 275) that, "water rates are in no sense taxes but are nothing more than the price paid for

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water as a commodity." In that respect that case is clearly distinguishable from the case at bar.

It is argued on behalf of the respondent that, notwithstanding the ordinance and board of health regulation, the application for permission to connect with the sewer must be regarded as the voluntary act of the petitioner because there is nothing in the law to compel him to erect a building at all, certainly not one with plumbing in it. The court takes judicial notice of the fact that the location of petitioner's building is within the business portion of the city where land is valuable. We think that the argument referred to does not afford a satisfactory response to the contention that the making of the application is not a voluntary act. Public as well as private interests benefit from the improvement of city property.

In *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, it was held that the sewer rate there involved was not a tax. But in that case the court emphasized the fact that there was no board of health regulation, or other law, requiring property owners to connect their premises with the public sewer. (pp. 401, 403.)

If the rate was made merely nominal or simply enough to cover the cost of inspection it might properly be regarded as an office fee or as an exercise of the police power, but the statute plainly shows, to our minds, that it was designed to be a revenue producing measure, and, as such, is to be regarded as a tax and, therefore, subject to the principles which govern the imposition and assessment of taxes. The rate demanded, and which the petitioner refuses to pay, is in addition to the "application fee" charged, which latter, it is alleged, the petitioner is willing to pay and has tendered.

The report of the superintendent of public works for the biennial period ending June 30, 1910, shows (p. 130) that for the fiscal year ending that date he had collected the sum of \$209 for sewerage application fees, and the sum of \$35,882.06 for sewer rates, including penalties on delinquent payments.

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"Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government, and for all public needs." Cooley on Taxation (2 ed.) 1.

"Taxes are generally defined as burdens or charges imposed by legislative authority on persons or property to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.'" 27 Am. & Eng. Enc. Law, 578.

"The word 'taxes' is very comprehensive, and properly includes, as indicated in the foregoing definition, all burdens, charges and impositions by virtue of the taxing power with the object of raising money for public purposes." *Ib.* 579.

There are "general" and "special" taxes. *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 197.

These sewer rates, imposed under the circumstances shown, fall clearly within the foregoing definitions of a tax. They are "enforced contributions," and "burdens or charges," imposed on property in aid of the public treasury and for the support of the government.

The power of taxation is essentially a legislative power. It cannot be delegated except to municipalities which themselves exercise subordinate legislative powers. The power to tax must not be confused with the administrative duties which are necessarily involved in the assessment and collection of taxes. In the nature of things, the legislature itself cannot attend to all the details involved in the enforcement of the law. Those must of necessity be entrusted to administrative officers. But the tax can be imposed only by the legislative power. No arbitrary discretion to fix the rate of a tax, or to determine the method by which it is to be levied, or to adjust its apportionment among the tax-payers, where the principles upon which the apportionment is to be made are not fixed, can be left to the executive branch of the government.

"There is a difference between making the law and giving effect to the law; the one is legislation and the other administration. We conceive that the legislature must, in every instance, prescribe the rule under which taxation may be laid;

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it must originate the authority under which, after due proceedings, the tax gatherer demands the contribution; but it need not prescribe all the details of action, or even fix with precision the sum to be raised or all the particulars of the expenditure. If the rule is prescribed which, in its administration, works out the result, that is sufficient; *but to refer the making of the rule to another authority*, would be in excess of legislative power." Cooley on Taxation (2d ed.) 62.

It will be observed that the only rule fixed by the legislature with reference to the tax in question is that the total amount of the revenue to be raised by its levy shall approximate as nearly as reasonably may be, but not exceed, the total yearly cost of maintaining and repairing the sewers together with interest on the bonds which represent the cost of installing the system. It is not a mere matter of calculation that has been left to the superintendent. The legislature failed to fix the principle upon which the charges were to be based. No rule or method is prescribed by which the superintendent shall be guided in fixing or adjusting the charges. It is left entirely to the discretion of the superintendent for the time being whether to fix the rates according to the length of street frontage of premises; or their area; or by the number of fixtures connected; or by a combination of those methods; or pursuant to any other plan which he may see fit to adopt. In short, the legislature has attempted to authorize the superintendent to levy the tax, and not merely to collect a tax which it alone may levy. It cannot be done legally.

"The determination of the amount or rate of a tax to be imposed is as essential in exercise of the taxing power as the designation of the property to be taxed or the time for its collection or enforcement." *State v. Ashbrook*, 154 Mo. 375, 389.

See also *State v. Glavin*, 67 Conn. 29; *Reelfoot Lake Levee District v. Dawson* (Tenn.), 36 S. W. 1041; *Houghton v. Austin*, 47 Cal. 646; *People v. Kings County*, 52 N. Y. 556; *Bernards Tp. v. Allen*, 61 N. J. L. 228; *Van Cleve v. Sewerage Commissioners*, *supra*; *State v. Mayor*, *supra*.

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We hold that sections 1036, 1037 and 1038 of the Revised Laws, in so far as they relate to the imposition, assessment and collection of rates for the use of the public sewers, being an illegal delegation of the taxing power, are invalid, and that the respondent is not authorized to demand from the petitioner an agreement to pay such rates as a condition precedent to the issuance of a permit to connect with the sewer. In so holding we are, of course, dealing with the case as it now stands. This appeal is from an interlocutory order. If, after answering, the respondent should show a valid reason for refusing to grant petitioner's application, as, for example, that the limit of the capacity of the sewer has been reached, so that additional connections cannot, with safety, be allowed, the relief sought may have to be denied. No such situation is now presented.

The contention has been made that mandamus would not lie in the event of our holding sections 1036 to 1038 to be invalid. We cannot adopt that view. Section 1035 of the Revised Laws places the duty of superintending the connecting of premises with the public sewers upon the superintendent of public works. This provision is separable from the rest of the statute and is not involved in the illegal attempt to vest the superintendent with the power of taxation. Should the legislature exercise its power to levy a special tax upon premises connected with the sewers, the supervision of the sewers might still be an appropriate function of the superintendent of public works. Such supervision as it now exists does not extend arbitrary discretion to the superintendent to refuse permits to connect with the sewers. The sewer system of Honolulu was constructed with a view to its being used by property owners, and when owners of premises comply with all legal requirements they are, prima facie, entitled to have their applications for permission to connect granted. Under such circumstances the granting of such applications is a ministerial duty the failure to perform which may be enforced by mandamus. *In re Akua'i*, 13 Haw. 239; *Hackfeld v. King*, 11 Haw. 5.

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The order overruling the demurrer is affirmed and the case is remanded to the circuit judge for further proceedings in conformity with this opinion.

W. S. Edings and P. L. Weaver (W. S. Edings and Magoon & Weaver on the briefs) for petitioner.

E. W. Sutton, Deputy Attorney General (Alexander Lindsay, Jr., Attorney General, with him on the brief) for respondent.

S. K. KAE0, ADMINISTRATOR OF THE ESTATE OF
AU CON CHEE, DECEASED, v. MARSTON CAMP-
BELL, COMMISSIONER OF PUBLIC LANDS OF
THE TERRITORY OF HAWAII, AND AU CHONG.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 24, 1911.

DECIDED MARCH 29, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PLEADING—*amendment—substantial change of claim.*

An amendment to a bill in equity intended to conform the pleadings to the facts proved will not be allowed when its effect would be to substantially change the petitioner's claim.

OPINION OF THE COURT BY PERRY, J.

These proceedings were commenced by a petition entitled "Bill to declare a trust" and praying that the defendant Au Chong be decreed to hold a certain leasehold in trust for the use and benefit of the estate of one Au Con Chee, deceased, and be ordered to transfer the lease to the plaintiff as administrator of the estate. The allegations of the bill are that in January, 1909, Au Con Chee by purchase at public auction became entitled to a leasehold interest in a certain town lot at Kapaa, Kauai; that on November 17, 1909, Au Con Chee died intestate at Honolulu without having had the lease executed; that on or

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about September 24, 1909, the defendant Au Chong, who is the brother of Au Con Chee, with knowledge of the purchase by the latter, falsely impersonated his brother to a deputy of the commissioner of public lands and fraudulently directed the deputy to cause the lease to be executed to Au Chong, that is, to himself; that the deputy believed Au Chong to be Au Con Chee and by reason of the impersonation and deceit subsequently, in November, 1909, caused to be executed a lease of the property in question to Au Chong; that the plaintiff, as administrator, did not discover these facts until shortly before the filing of the bill; and that Au Chong is insolvent and has refused to comply with a demand to transfer the lease to the plaintiff.

The defendant Au Chong answered denying the false impersonation and all of the other fraud charged. The decree granted the prayer of the bill.

The evidence adduced at the trial was brief and clear. There was absolutely none to support the charges of fraud. This is expressly conceded by counsel for plaintiff both in his brief and orally in this court. What the evidence did show, in addition to the undisputed fact of the purchase at public auction by Au Con Chee in January, 1909, of the lease in question, was that Au Con Chee paid six months' rent for the land and that owing to difficulties, not stated in the evidence, the lease remained unexecuted; that the deputy of the superintendent of public works knew Au Con Chee "pretty well,—a small under-sized man" and "knew his brother" (Au Chong) "especially by a peculiarity of his eyes, half open all the time;" that on or about September 24, 1909, at Kapaa, one (not Au Chong) whom the deputy believed to be Au Con Chee called on him and requested him to transfer the lease to his brother and the deputy replied in effect that the request would be granted; and that subsequently, on or about November 23, 1909, the lease was executed to Au Chong.

The plaintiff now orally offers in this court to amend his bill, as he also did in the trial court, "so that the facts alleged

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shall conform to the proof," but precisely what the terms of the proposed amendment would be has not been specified. Presumably its theory would be that by reason of the proceedings had in January, 1909, Au Con Chee in his lifetime, and subsequently his representatives, became entitled to demand and receive from the superintendent of public works a lease of the lot in question, and that Au Chong, having received the lease with full knowledge of these facts, took it as trustee for Au Con Chee and should be compelled to transfer it to the latter's representatives. In other words, the bill would become practically one for specific performance of a contract to lease instead of one for the declaration of a trust on the ground of actual fraud.

While our statute on amendments (R. L., §1738) is liberal we think that under the circumstances the motion for leave to amend should be denied. Even under the statute an amendment to conform the pleadings to the facts proved should not be allowed unless it "does not substantially change the claim." In this instance the amendment would substantially change the claim. The defendant, as the record shows, confined his evidence at the trial to the sole issue of fraud and should be permitted an opportunity to be heard upon any new claim of the petitioner.

The decree appealed from is reversed and the bill is dismissed without prejudice.

C. C. Bitting (Thompson, Clemons & Wilder on the brief) for plaintiff.

R. W. Breckons for Au Chong.

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DON ROBINSON v. HONOLULU RAPID TRANSIT & LAND CO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 13, 1911.

DECIDED APRIL 1, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

NEGLIGENCE—proof of, question for jury.

Under the circumstances set forth in the opinion, the questions whether a collision between defendant's street car and plaintiff's wagon was caused by defendant's negligence, or by plaintiff's contributory negligence, or was the result of a mere error of judgment on the part of the motorman, were for the jury to decide under appropriate instructions.

SAME—rights of street cars and vehicles on streets.

The rights and obligations of persons using vehicles on the streets and of street railway companies operating cars thereon are mutual and reciprocal. A street car cannot overtake and run down a vehicle under ordinary circumstances without negligence or willful wrong.

NEW TRIAL—motion for—sufficiency of evidence.

In this Territory the circuit judges are not authorized to set aside a verdict and grant a new trial where the sole objection to the verdict is that it is against the weight of the evidence when there is more than a scintilla of evidence to support the verdict.

OPINION OF THE COURT BY ROBERTSON, C.J.

In this case the plaintiff claimed damages against the defendant in the sum of \$5048 for personal injuries sustained by him by reason of the alleged negligence of the defendant in the operation of one of its street cars. The jury rendered a verdict in plaintiff's favor, assessing the damages at the sum of \$548. At the close of the evidence the defendant moved for a directed verdict on the grounds that the evidence showed that the plaintiff himself was negligent and that the defendant was without negligence on its part. The motion was denied. The defendant excepted to the verdict on the grounds that it was against the law and the evidence and against the weight of the evidence.

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The defendant then filed two motions, one for judgment *non obstante veredicto*, and the other for a new trial. The motion for judgment notwithstanding the verdict was based on the grounds that the proofs adduced did not tend to sustain the acts of negligence charged in plaintiff's complaint; that there was no evidence of negligence on the part of the defendant; and that by clear and uncontradicted evidence it was shown that the injuries sustained by the plaintiff resulted from negligence on the plaintiff's part. The motion for a new trial was also based on the ground of the insufficiency of the evidence to support the verdict as well as on other grounds which need not be noticed. The motion for judgment was denied, but the motion for a new trial was granted. The defendant excepted to the denial of its motion for judgment while the plaintiff excepted to the order setting aside the verdict and granting a new trial. These two are the only exceptions presented for our consideration.

The plaintiff adduced testimony tending to show that on the afternoon of November 26th, 1909, he was driving an army escort wagon drawn by four mules on the way from Fort Shafter to the Matson wharf, in Honolulu, and, when about two hundred yards north from the Palama fire station, on King street, the wagon which he was driving was run into by a street car operated by the defendant company; that at the time of the collision and for some time prior thereto, the mules being on a trot, the wagon was travelling parallel to the car track, the left hand wheels being between one foot and two feet from the right hand car track; that the wagon was a heavy one and made considerable noise; that plaintiff heard no sound of a gong or other warning of the approach of the car which was overtaking the wagon, and was not aware of the presence of the car until, happening to look over towards his left, he saw it just as it came in contact with the wagon; the wagon was jolted and plaintiff was thrown from the seat to the ground; and that plaintiff sustained injuries to his feet and other parts of his body. The testimony

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also tended to show that the plaintiff was an experienced driver; that he was familiar with the street on which he was driving; that there was ample room for the wagon on each side of the car track; that there were no obstructions of any kind on the road at the time of the accident; and that the view of the street and car track was unobstructed for the distance of about three hundred yards northerly from the place of the collision. Plaintiff said he believed he was not conversing with the man who was with him. A companion, who was on the seat of the wagon with the plaintiff, testified that about three minutes prior to the collision he had turned and looked back but saw no car; that he did not hear the car approaching, and did not know it was there till he felt the jolt of the impact; and that the wagon did not turn toward the track just as the car came along. Neither the plaintiff nor his companion were able to state what part of the wagon was struck, nor were they able to testify as to the speed of the car.

The testimony adduced by the defendant came, principally, from two of its motormen, one of whom was operating the car and the other was standing on the platform with him. Their testimony tended to show that they first saw the plaintiff's wagon when it was about three hundred or four hundred feet ahead of the car, travelling in the same direction; that plaintiff and his companion were apparently engaged in conversation; the power had been thrown off and the car was going at the rate of about seven miles an hour on a slight down grade with a slight curve to the track; that the gong was sounded from the time that the wagon was first seen until the collision took place; that the running board of the car projected two-and-one-half or three feet beyond the car track, and the wagon wheels were three or four feet from the track; that the speed was reduced till the car, when it had nearly reached a point abreast of the rear end of the wagon, was going at the rate of about four miles an hour; that at this point, both motormen being satisfied that there was room to pass, the power was increased to "five

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points" (five or six miles an hour) with the idea of going by the wagon; that just at this moment the mules, which were walking, began to turn in toward the track, whereupon the driver, glancing around and seeing the car, turned the mules off toward the right; that this last movement caused the left front wheel to swing out to the left and toward the track, and before the car could possibly have been stopped, the front end of the steps collided with the tire of the wagon wheel; that the brakes had been applied and the power thrown off, and the car was stopped within three or four feet. One of the motormen testified that if the wagon had maintained its original distance from the track and had "followed the curved point" there would have been no collision.

As to the motion for judgment *non obstante veredicto*. The contention is made, and is supported by authority, that where specific acts of negligence are charged, and not general negligence, the plaintiff is entitled to recover only upon proof of those specific acts. The argument, however, assumes that the case alleged by the plaintiff "is one of running the car at a fast rate onto the rear of plaintiff's wagon, and in not giving plaintiff any warning." This is hardly a fair construction to put upon the plaintiff's pleading. The third paragraph of the complaint alleges, *inter alia*, that "the defendant did, then and there, wrongfully, negligently, and in utter disregard of the safety and rights of the plaintiff, and without sounding any alarm or giving any warning which the plaintiff could or did hear, run said car upon and against the easterly or left-hand hind wheel of said wagon with great force and violence." Eliminating the parenthetical sentence in regard to the failure to give warning, it is definitely averred that the defendant did wrongfully and negligently and in utter disregard of the plaintiff's rights, run its car against the wagon. That allegation was sufficient to put the defendant on its defense, and as, in our opinion, there was evidence to support it, the point sought to be made cannot be sustained.

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We think the trial judge was right in overruling the motion. While it may be regarded as a rather close case, upon the evidence, there was fair room for argument as to whether the collision was the result of defendant's negligence, or was caused by contributory negligence on the part of the plaintiff, or resulted from a mere error of judgment on the motorman's part. Those were questions for the jury to pass upon under appropriate instructions. The wagon was in plain view of the motorman; it was drawn by four mules; it was close to the track; having no springs, the noise it made naturally rendered it difficult for the driver to hear the gong; neither occupant of the wagon showed any signs of being aware of the approach of the car; and the testimony was conflicting on the point whether the wagon turned toward the track just as the car came along. The circumstances shown were such that the jury could have found that the motorman was negligent in trying to pass the wagon without making further efforts to apprise the men on it of the presence of the car, also that the motorman deliberately took unnecessary chances in trying to pass the wagon under such circumstances. See *Tunison v. Weadock*, 130 Mich. 141, 159; *Ablard v. Detroit United Railway*, 139 Mich. 248; *White v. Worcester Street Railway*, 167 Mass. 43; *Carrahar v. B. & N. Street Railway*, 198 Mass. 549; *Callahan v. Boston Elevated Ry. Co.* (Mass.), 91 N. E. 388.

The rights and obligations of persons using vehicles on the streets and of street railway companies operating cars on the same streets are mutual and reciprocal. Both are required to use due care to avoid collisions. *Dong Chong v. Rapid Transit Co.*, 16 Haw. 272. A street car cannot run down a vehicle from behind under ordinary circumstances without negligence or willful wrong. *Richmond Passenger Co. v. Allen* (Va.), 49 S. E. 656; *Vincent v. Street Railway Co.*, 180 Mass. 104; *Carrahar v. B. & N. Street Railway*, *supra*.

The *Dong Chong* case is much relied on by the defendant. In that case the court below had granted the defendant's motion

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for a non suit. This court sustained that action, though with some reluctance. The circumstances involved in that case differed from those here involved in the important particular that the plaintiff and his team were facing the car and saw it approaching. The motorman was justified in assuming from the plaintiff's conduct that it was safe for him to proceed to pass the wagon even though it was close to the car track.

As to the motion for a new trial. The trial judge was of the opinion, evidently, that there was not such a lack of evidence to support the plaintiff's allegations as would justify the granting of the motion for judgment notwithstanding the verdict, but, he said, the verdict was "so decidedly against the weight of the evidence" that he felt obliged to grant the motion for a new trial.

It may be conceded that a trial court has the discretion, under some circumstances, to set aside a verdict and grant a new trial where it appears to the judge that the losing party has not had a fair trial; and that the exercise of that discretion would not be interfered with by this court unless it appeared that the discretion had been abused. But the rule does not apply to a case where the only objection to a verdict is that it is against the weight of evidence, and the judge believes it so to be, providing there was more than a mere scintilla of evidence to support the verdict. In a case where the verdict is supported by only a scintilla of evidence the trial court has the discretion to grant a new trial or order the entry of a judgment *non obstante veredicto*, as the circumstances may warrant. Where the evidence is clear and probably would not be different should the case be tried again the latter course would be appropriate.

In the case at bar the verdict was supported by more evidence than a mere scintilla.

In some jurisdictions the trial courts are expressly authorized by statute to set aside verdicts and grant new trials "for insufficient evidence." In those jurisdictions the trial judges

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have a broader discretion than the circuit judges in this Territory have.

Our statute provides that the jury shall be the exclusive judges of the facts in all cases tried before them. R. L. Sec. 1798. In this jurisdiction it is settled that a mere scintilla of evidence is insufficient to support a verdict. *Smith v. Hamakua Mill Co.*, 14 Haw. 669; *Wo Sing Co. v. Kwong Chong Wai Co.*, 16 Haw. 17. But it has often been held that this court would not set aside a verdict where there was some evidence, i. e., more than a scintilla of evidence, to support it. In *Kapiolani Estate v. Cleghorn*, 14 Haw. 330, 338, Chief Justice Freear, speaking for the majority of the court, said, "On the whole, in our opinion, there was sufficient evidence to sustain the verdict whether the weight of the evidence was on that side or not." See also, *Kaleleonalani v. Trustees Lunalilo Estate*, 4 Haw. 82, 88.

In connection with this branch of the case the defendant relies largely on *Macfarlane v. Lowell*, 9 Haw. 438. That was an action of assumpsit. The trial judge had granted a new trial on the ground that the verdict was, in his opinion, against the weight of the evidence. This court found that the testimony of the defendant, who was the only witness for the defense, was "inconsistent and very indefinite," and sustained the action of the trial judge. If the court intended to hold that, in this jurisdiction, a trial judge is possessed of the discretion to set aside a verdict merely because he is of the opinion that it is against the weight of the evidence, we must decline to consider that case as a precedent to be followed. Such a ruling would be contrary to the theory upon which the later case of *Ahmi v. Cornwell* was decided. In that case this court said, "It may be that the trial judge thought that the verdict should have been for the plaintiff, and it may also be that that view would find support in the evidence. That matter, however, was peculiarly one for the determination of the jury, and, clearly no sufficient cause appeared for disturbing its finding or verdict. The ex-

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ception is sustained and the order granting a new trial set aside." 14 Haw. 301, 303.

The defendant's exception to the denial of its motion for judgment *non obstante veredicto* is overruled, and the plaintiff's exception to the order setting the verdict aside and granting a new trial is sustained. The case is remanded to the circuit court with instructions to set that order aside.

G. A. Davis (A. L. C. Atkinson with him on the brief) for plaintiff.

J. W. Cathcart and A. L. Castle (Castle & Withington on the brief) for defendant.

LYDIA C. LUCAS, TRUSTEE, v. CHARLES LUCAS,
JOHN LUCAS AND MARY N. LUCAS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED MARCH 9, 1911.

DECIDED APRIL 7, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

WILL—*absolute title—alienation, restraint of.*

A testator devised property to his sons, "their heirs and assigns forever;" then, by a subsequent clause in his will, he declared "that neither of my sons * * * shall, during their lifetime, dispose of said interest to any person without the consent in writing of the other two first being had and obtained." Held, that the attempted restraint by the testator is void and the devisees acquired the absolute title to the property with the right and power to dispose of it at will.

PARTIES—*trustee, cestuis que trust.*

While it is true the general rule is that in suits respecting trust property brought either by or against trustees the *cestuis que trust* as well as the trustees are necessary parties, still, where a suit is brought by a trustee for the recovery of trust property, or to reduce it to possession, and it in no wise affects his relation with his *cestui que trust*, the latter need not be made a party.

Lucas v. Lucas, 20 Haw. 433.

PARTNERSHIP—sale of partner's interest—rights of purchaser—multifariousness.

A partner may sell his interest in the partnership and one who having acquired the interest of a former partner and having been received by the other partners in the place and stead of the former partner becomes a partner under the original agreement and is in a position to rightfully demand an accounting concerning all the partnership property and business transactions covering the entire period from the formation of the partnership down to the filing of the bill, and the allegation of those facts does not render the bill multifarious.

JUDGES—disqualification of—Sec. 84, Org. Act.

By the terms of Sec. 84, Org. Act, a justice is not disqualified from sitting in a cause by reason of his relationship by affinity within the third degree to a son of the plaintiff, the son not being "interested, either as plaintiff or defendant."

OPINION OF THE COURT BY DE BOLT, J.

This is a suit in equity entitled, "Bill by one partner against two other partners in the trade and business of carpenters and builders and contractors for an account of partnership transactions and for an injunction to restrain the defendant, Charles Lucas, from receiving the partnership moneys, for the appointment of a receiver and also for directions for the future management of the business."

Each of the defendants interposed a demurrer upon like grounds to the bill, but the defendant, John Lucas, withdrew his demurrer, and the demurrers of the other two defendants having been sustained and the bill dismissed, the plaintiff thereupon appealed from the decree to this court.

The chief justice having suggested to counsel the possibility of his disqualification to sit in this case by reason of his relationship by affinity within the third degree to a son of the plaintiff, upon consideration, it is our opinion that he is not disqualified. Counsel on both sides also take the view that there is no disqualification. *Ewa Plantation Co. v. Tax Assessor*, 18 Haw. 509; *Smith v. Lindsay*, ante, 262.

Section 84 of the Organic Act provides that "no person shall

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sit as a judge * * * in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant * * *." The plaintiff's son is not "interested, either as a plaintiff or defendant." He neither brings nor defends this suit. He is a stranger to the record. He is not a party. "Whoever brings a suit, bill or complaint, is a party plaintiff, and whoever is bound to appear and make answer or defend, is in law the party defendant." *Canaan v. Greenwoods Turnpike Co.*, 1 Conn. 1, 9; 30 Cyc. 1636; 13 Cyc. 762.

Congress, in the use of the term "plaintiff or defendant," must have intended a party to the record—one who brings or is bound to appear and answer or defend a cause in court.

The bill alleges, in substance, that in 1892, the "late Thomas R. Lucas," husband of the plaintiff, Charles Lucas and John Lucas entered into a partnership under the firm name of Lucas Brothers, for the purpose of carrying on the trade and business of carpenters, builders and contractors, which trade and business they so continued to carry on until April 19, 1910; that the property of the partnership consisted of the machinery, carpenters' tools, implements, and the planing mill, together with the rights, credits and good will of an established business in Honolulu, which had been carried on by their late father, George Lucas, and which property and business, he, George Lucas, by his will, devised to his sons, Thomas R., Charles and John, "to have and to hold one-third each to them their heirs and assigns forever and upon these conditions subject to the payment of the mortgage thereon and also subject to the payment of the debts of said business, the Honolulu planing mill, and all debts connected with said property, and also upon the condition that neither of my sons, Thomas R., John or Charles, shall, during their lifetime, dispose of said interest to any person without the consent in writing of the other two first being had and obtained;" that from about the year 1892 until December 1, 1910, Charles Lucas received all moneys due the

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partnership, acted as its financial agent and manager, drew all checks, kept the books of account, or controlled their keeping, and paid out all moneys received in the course of the business; that he has not duly and regularly entered all such transactions on the partnership books of account, but has entered therein only a part of such transactions; that he kept Thomas R. Lucas in ignorance of the financial transactions of the partnership and has continued to keep the plaintiff in ignorance thereof from the time of the death of her husband until December 1, 1910; that he has received large sums of money from the contracts and business transactions of the partnership which he did not enter in the books of account, but used the same for his own private purposes; that from 1893 to 1910 he used the money of the partnership, amounting to the sum of \$35,000, or more, for the purpose of purchasing large tracts of land in the Territory of Hawaii, the title to which land so acquired was taken in the name of his wife, Mary N. Lucas; that she, Mary N. Lucas, also holds other interests in lands as mortgagee for which she is the mere trustee, and which in equity and good conscience belong to the partnership; that on December 31, 1909, Thomas R. Lucas, "in consideration of the sum of one dollar," executed a certain deed whereby he conveyed all his property, including his interest in the partnership and a life insurance policy for the sum of \$5000, to George A. Davis, trustee,

"To have and to hold the same with all and singular the rights, easements, privileges and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rights, issue and profits thereof, and all rights thereto, unto the said George A. Davis, trustee and his successors in trust, their heirs and assigns forever, subject to any existing incumbrances, but in trust nevertheless to grant, bargain, sell, convey, assign, transfer and assign all of said property hereinbefore set out and included or intended to be included in this deed, to Lydia C. Lucas, my wife as trustee to hold, use, manage and absolutely in her discretion control and administer the same during the full term of her natural life and for such other purpose as are to be set

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out and expressed in the deed of conveyance and assignment to be made and executed by the said George A. Davis as such trustee to the said Lydia C. Lucas as trustee and subject to the conditions and provisos therein contained and set out and upon executing such conveyances the said George A. Davis shall be fully released of and from all responsibilities and liability as trustee under this deed and otherwise."

That on the same day, in pursuance of the foregoing deed, George A. Davis, trustee, "in consideration of the sum of one dollar," by a certain other deed, conveyed all the property, partnership interest and the life insurance policy, mentioned in and conveyed by the foregoing deed, to Lydia C. Lucas, trustee,

"To have and to hold the same with all the rights, easements, privileges and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and all rights thereto unto the said Lydia C. Lucas, Trustee, and her successors in trust and their heirs and assigns forever.

"But in trust nevertheless, to hold, use, manage, control and administer the same upon the following trusts, that is to say,

"The Trustee, Lydia C. Lucas shall during the full term of her natural life, if she deems it prudent and profitable shall continue to carry on the business of carpenter builder and contractor in conjunction with the other members of the firm of Lucas Brothers if satisfactory to the other partners or the survivor of them and the said trustee shall have the sole right to so determine and she shall have and receive the entire net income arising from said business and all net profits for the full term of her natural life and is hereby given full power to run and conduct the said business as a partner therein in the same manner and to the same extent as her husband Thomas R. Lucas could do when alive and she, the said Trustee, may retain the whole of the net income and profits from the business and from the property hereby conveyed during the full term of her natural life.

"And the said Lydia C. Lucas is hereby empowered to sell and dispose of all the property rights and credits hereby conveyed, sold and assigned, but she, the said Trustee shall invest the money received from such sale or sales in good safe se-

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curities and she shall be entitled to the net income and profits arising from said money so invested during the full end and term of her natural life.

"It is hereby expressly understood and the true intent and meaning of this deed is that upon the death of the said Lydia C. Lucas the children of Thomas R. Lucas and Lydia C. Lucas then living and the survivors of them the said children shall appoint a successor to the said Lydia C. Lucas as Trustee and in case of their failure to agree upon a suitable person then the Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii shall appoint a Trustee who shall immediately make, execute and deliver a deed of conveyance of all the property rights and credits, including all the real and personal property hereby sold, assigned, given, granted and conveyed to the children of the said Thomas R. Lucas and Lydia C. Lucas then living and the said children then surviving shall each be entitled to one equal share of the said property hereby granted, assigned and conveyed and the same shall immediately vest in them, the said children, their heirs, executors, administrators and assigns upon the death of the said Lydia C. Lucas but during the life time of the said Lydia C. Lucas she shall remain and be the sole person to handle, control and dispose of said property as she deems advisable save and except that all principal monies arising from such sale or sale shall be invested as aforesaid.

"The Trustee shall pay all taxes and charges against said property and shall have full power to employ such persons to assist her in the conduct of the business of Lucas Brothers as she deems advisable.

"It is hereby expressly understood that said Lydia C. Lucas shall have full and complete control of all the property herein conveyed during the term of her life and the entire income arising therefrom but the principal of said property shall not be diminished unless the income therefrom shall not be sufficient to support the said Lydia C. Lucas in which event she shall have full power to spend the principal or any portion thereof that may be necessary for her proper support and maintenance.

"This trust shall terminate upon the death of the said Lydia C. Lucas and all property real, personal and mixed shall be equally divided between the children then living, issue of the marriage of Thomas R. Lucas and Lydia C. Lucas and the

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survivor or survivors in the manner hereinbefore provided for herein.

"The said Lydia C. Lucas the Trustee herein and hereunder does hereby join with the grantor in the execution hereof in token of her acceptance of the trusts and covenants to faithfully perform the duties imposed by this deed and the laws of the land."

That on April 26, 1910, the plaintiff informed John and Charles Lucas that she desired to continue to carry on the business and partnership "so carried on and conducted by her late husband as one of the partners," and they agreed thereto and that she should stand in the place and stead of her husband as an equal partner, and that the business was so carried on and conducted under the firm name of Lucas Brothers, from April 1910 until December 1, 1910; that upon the death of Thomas R. Lucas and the payment of his life insurance in the sum of \$5000, Charles Lucas prevailed upon the plaintiff to allow him to take and use the said sum of \$5000 for partnership purposes, with the understanding that the partnership would repay her two-thirds of it, which Charles and John Lucas agreed to do, and they accordingly caused to be prepared a memorandum in writing to be signed by them; that upon the memorandum being prepared they refused to sign the same, but in pursuance thereof they have paid the plaintiff the sum of \$600; that the plaintiff made application to Charles and John Lucas to have the books of the partnership audited and to render an accounting to her concerning the property and business transactions of the partnership from the time of its formation to November 1, 1910, which they refused to do, whereupon she brought this suit.

The demurrers interposed were based upon the following grounds:

"1. That it appears by said bill that the children of Lydia C. Lucas and Thomas R. Lucas, cestuis que trustent under that certain trust deed referred to in said bill, are necessary parties to said bill but said plaintiff has not made them parties.

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"2. That it appears by said bill that plaintiff is not entitled to bring this suit.

"3. That it appears by the said bill that the same is multifarious in that it seeks an accounting and other matters in regard to two separate and distinct partnerships between separate and different persons.

"4. That in so far as said bill seeks relief in connection with any partnership alleged to have existed between Charles Lucas, John Lucas and Thomas R. Lucas it appears by said bill that said plaintiff has no interest in the subject matter thereof.

"5. That it appears by said bill that this defendant is not answerable to plaintiff in so far as said bill seeks relief in regard to any partnership alleged to have existed between the said Charles Lucas, John Lucas and Thomas R. Lucas.

"6. That the plaintiff's right to sue has been barred by the statute of limitations.

"7. That the plaintiff's right to sue has been barred by laches.

"8. That said bill is ambiguous, uncertain and unintelligible in that (a) it does not appear in and by said bill for whom plaintiff is trustee, (b) in that it does not appear in and by said bill when Thomas R. Lucas died, (c) in that it does not appear in and by said bill whether the said Thomas R. Lucas died testate or intestate, (d) in that it does not appear by said bill that the will of George Lucas referred to in said bill was ever admitted to probate, (e) in that it does not appear from said bill whether the agreement of partnership alleged to have existed between Thomas R. Lucas, Charles Lucas and John Lucas was oral or in writing, and if in writing no copy thereof is attached to and made a part of said bill.

"9. That in so far as the allegations of paragraph VII of said bill are concerned plaintiff has a plain, adequate and complete remedy at the common law in regard thereto.

"10. That said bill does not seek or pray for the dissolution of any partnership alleged therein to have existed, by reason whereof this court is without jurisdiction in the premises.

"11. That plaintiff has not in and by said bill made or stated such a cause as does or ought to entitle her to any such discovery or relief as is hereby sought and prayed for from or against this defendant."

Of the grounds of demurrer thus stated, the circuit judge

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sustained the first, third, fourth, fifth, eighth and ninth.

Preliminary to the consideration of the specific questions raised by the demurrers, we will first dispose of the question as to the force and effect of the following clause contained in the will of George Lucas, as above quoted, namely, "that neither of my sons, Thomas R., John or Charles, shall, during their lifetime, dispose of said interest to any person without the consent in writing of the other two first being had and obtained." It will be observed that the testator devised the property to his sons, "their heirs and assigns forever," and then, by a subsequent clause, just quoted, he attempted to restrain the disposition of it. The attempt to thus restrain the alienation of the property was in conflict with the universally recognized doctrine that every person has the inherent right of absolute dominion over his property, which includes the right and power to freely sell and dispose of the same whenever and to whomsoever he may choose. It follows that the attempted restraint by the testator must be declared void and the devisees held to have acquired the absolute title to the property with the right and power to dispose of it at will. *Simerson v. Simerson*, ante, 57, 59; *Nahaolelua v. Heen*, ante, 372, 377; Gray on Perpetuities, §120; 2 Jarmon on Wills, *854, *856, *860, *864; Redfield on Wills, 665, 667; 30 Cyc. 1518.

With regard to the first ground of demurrer, namely, the failure to make the children of the plaintiff parties to the suit, the defendants contend that they are necessary parties. Under the facts as disclosed by the bill, we are of the opinion, however, that the children are not necessary parties. It will be observed that the plaintiff under the conveyance to her has absolute control of the property; that she can sell and dispose of it at will, so long as she invests the proceeds in "good safe securities;" that she is entitled to the entire net income; that in this suit she represents the children, and, in accordance with her duty, she is seeking to protect the entire property and compel an accounting. While it is true "the general rule is that

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in suits respecting trust property brought either by or against trustees the *cestuis que trust* as well as the trustees are necessary parties," still, "where a suit is brought by a trustee for the recovery of trust property, or to reduce it to possession, and it in no wise affects his relation with his *cestui que trust*, the latter need not be made a party." 1 Beach, Mod. Eq. Prac., §70; *Carey v. Brown*, 92 U. S. 171; *Kerrison v. Stewart*, 93 U. S. 155; *Stevens v. Bosch*, 54 N. J. E. 59.

The case at bar is clearly distinguishable from the case of *Magoon v. C. Lai Young*, 14 Haw. 376, cited by the defendants on this question of parties. That case was brought by "J. Alfred Magoon, Trustee for Sophie Kahuole Wiley and J. W. Wiley, and Chun Kin Fong, plaintiffs, vs. C. Lai Young, defendant." The bill in the case cited shows that one Pomaikai sold to Mrs. Wiley certain land but that by mutual mistake the land described in the deed was different from that intended; that afterwards Mrs. Wiley made a similar mistake in attempting to convey the land to J. A. Magoon as trustee; that thereafter C. Lai Young obtained a deed of all Pomaikai's interest in the land without consideration and with notice of the mistake and then brought ejectment for the land against Mrs. Wiley and Chun Kin Fong, the lessee; that Mrs. Wiley entered into possession when she purchased the land and continued in possession. The prayer was for a conveyance to the plaintiffs by the defendant of all the interest acquired by the latter in the land. The defendant demurred on the ground of non-joinder of the *cestuis que trust*, Sophie K. and J. W. Wiley. The court held that this ground was well taken, and, *inter alia*, observed, that "It is easy to see that the *cestuis que trust* in this instance are materially interested. For instance, not only are they interested in the question whether the conveyance should be made at all, but they may have ground for showing that it should be made to them or one of them instead of to the trustee." It is also obvious that relief was sought from the consequences of a mistake made by others than the parties to the suit.

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The possibility of a conflict of interest between the trustee and *cestuis que trust*, so apparent in that case, is entirely absent in the case at bar.

As to the second, fourth, fifth and eleventh grounds of demurrer, whether the plaintiff is "entitled to bring this suit," whether she has any "interest in the subject matter thereof," whether the defendants are "answerable to plaintiff in so far as said bill seeks relief in regard to any partnership alleged to have existed between the said Charles Lucas, John Lucas and Thomas R. Lucas," or whether the plaintiff has "stated such a cause as does or ought to entitle her to any such discovery or relief as is hereby sought and prayed for from and against" the defendants, must necessarily depend upon the final conclusion to be reached after full consideration of all the questions before us.

The sixth and seventh grounds of demurrer, that the plaintiff's right to sue has been barred by the statute of limitations and by laches, are without merit. The bill shows that the business of the partnership was continued by the surviving partners and the plaintiff in all respects as it had been before the death of Thomas R. Lucas, and that no partnership settlement or accounting was ever had, either before or after the death of Thomas R. Lucas. Wood on Limitations, (3d ed.) Sec. 210; *Riddle v. Whitehill*, 135 U. S. 621, 637; *Cole v. Fowler*, 68 Conn. 450; *Harris v. Mathews*, 32 S. E. 903; Secs. 1971, 1972, R. L.

It is clear under the authorities that the plaintiff acquired all the interest of her husband in the partnership. Whether the partnership was dissolved by the execution of the trust deeds, or by the death of Thomas R. Lucas, or at all, is immaterial; because the plaintiff, subsequent to the conveyance to her and the death of her husband was admitted into the partnership business by the surviving partners in the place and stead of her husband as an equal partner, and, whatever her rights were as to an accounting before she was admitted as a partner, there

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can be no question in this respect, now that she has been admitted into the partnership, upon sufficient cause shown therefor. Parsons on Partnership (4th ed.) §106, says: One who represents the interest of a former partner, if received by the other partners and treated as a partner, becomes a partner under the original articles." See 2 Lindley on Partnership, *697, *698; Parsons on Partnership, (4th ed.) §§9, 112, 305, 314; 22 Am. & Eng. Ency. Law. 205, 206; 30 Cyc. 458.

The third ground of demurrer presents the question of multifariousness. In the view we take of the case, the plaintiff having acquired the interest of her husband, and having been admitted into the partnership business as an equal partner with the surviving members of the firm, she not only acquired a one-third interest in the entire partnership property and business, including all rights, credits and demands of the firm, but she also acquired the right to an accounting concerning the same, covering the period from 1892 to the date of filing her bill. She occupies the position her husband, if alive, would have occupied had he not disposed of his interest. The parties to this suit are equally interested and alike concerned in all the property acquired and in all the business transactions had by the partnership, both before as well as after the death of Thomas R. Lucas. They are alike concerned in all the facts alleged; and, whatever decree may finally be entered, they are equally concerned. The bill, in our opinion, clearly, is not multifarious.

With regard to the eighth ground of demurrer, that the bill is ambiguous, uncertain and unintelligible, in that it does not show for whom the plaintiff is trustee, nor when Thomas R. Lucas died, nor whether he died testate or intestate, nor that the will of George Lucas was ever admitted to probate, nor whether the agreement of partnership between Thomas R., Charles and John Lucas was oral or in writing, it will be observed that the trust deeds set out in the bill show that the

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plaintiff is trustee for her children. This disposes of the question as to whom she is trustee for.

As to when Thomas R. Lucas died and whether he died testate or intestate, is wholly immaterial. The plaintiff's claim in no wise depends upon the time or fact of his death. Indeed, her position would be just the same if he were alive. The estate of Thomas R. Lucas, if he left one, is not involved in this suit.

Whether the will of George Lucas was ever admitted to probate or not is immaterial so far as the parties to this suit are concerned. The bill shows that Thomas R., Charles and John Lucas acquired the property and business formerly owned by their father, and that they ever since have had the exclusive use and possession of it, together with the profits accruing. Whether the title is defective or not, or whether they acquired the property by their father's will or not, is immaterial so far as the purposes of this suit are concerned. Whatever title, if any, they acquired, Thomas R. Lucas had a one-third interest in the property, business and profits. He had the same rights that each of the other two partners had, and whatever title he had he conveyed to the plaintiff.

As to whether the agreement of the partnership between Thomas R., Charles and John Lucas was oral or in writing is likewise immaterial. Moreover, this is a matter particularly within the knowledge of the surviving members of the partnership, and it is also a matter upon which they cannot be surprised or prejudiced.

Upon the ninth ground of demurrer the defendants contend that the plaintiff "has a plain, adequate and complete remedy at law" for the recovery of that portion of the life insurance money paid and used in the partnership business. Whatever the correct view upon this question might be under other circumstances we need not now determine. It is sufficient to say that the money having been paid into and used by the partnership under the circumstances alleged in the bill sufficiently

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identifies it with and as a part of the property and partnership transactions involved in this controversy. The plaintiff's claim with reference to this money is not against Charles and John Lucas, or either of them, but against the partnership of which she is a member. *Fernandez v. Camara*, 12 Haw. 183.

The case at bar is clearly distinguishable from the case of *Holmes v. Mello*, 15 Haw. 72, cited by the defendants. The case cited was simply an action of assumpsit for money paid by Holmes for the use of Mello to meet his share of the expenses of the partnership; such advances having been made in pursuance of an agreement entered into by them before the formation of the partnership.

As regards the tenth ground of demurrer, that the bill does not seek or pray for a dissolution of the partnership, the record before us shows that the plaintiff asked leave of the circuit judge to amend her bill in this respect, but her request was denied. The amendment should have been allowed; but the fact that the amendment was offered by the plaintiff before the bill was dismissed by the circuit judge renders it unnecessary for us to determine whether the prayer for dissolution of the partnership was necessary or not. We are of the opinion, however, that the bill with the proposed amendment made will state a cause relievable in equity. The decree dismissing the bill, therefore, is reversed and the cause is remanded to the circuit judge with directions to allow the amendment asked for and to proceed in accordance with this opinion.

G. A. Davis (*G. S. Curry* with him on the brief) for plaintiff.

C. C. Bitting (*Thompson, Clemons & Wilder* on the brief) for defendants.

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IN THE MATTER OF THE APPLICATION OF FRANK B. CRAIG FOR A WRIT OF HABEAS CORPUS FOR AND ON BEHALF OF RAMON ORTIZ, JUAN ORTIZ, JOSE REYES, LIBERATE GOMEZ, CANDIDIO RIVERA, IGNACIO HOHEB, CARLITO HOHEB, BASILIO, VINCENTE, MIGUEL, EUGENIO, GRACIAS, IZAKAEL CASTANEDA, MAXIMINIO AND EUGENIO.

ORIGINAL.

HEARD APRIL 3, 4, 1911.

DECIDED APRIL 8, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

WITNESSES—*recognizances to appear before grand jury—inherent power of circuit judges to require.*

Circuit judges at chambers have not inherent power, aside from statute, to require proposed witnesses to give recognizances to appear and testify before the grand jury, when the accused has not been committed for trial or held to await the action of the grand jury and no indictment is actually under consideration by the grand jury or to commit the witnesses to jail without giving them an opportunity to furnish the recognizances.

Id.—*statutory power of circuit judges.*

Under the circumstances above stated circuit judges at chambers have not the said power to require recognizances or to commit to jail, either under R. L., §1899, or under R. L., §1648, or under Org. Act, §83, or under all of said sections.

OPINION OF THE COURT BY PERRY, J.

Upon an application by the attorney-general of the Territory a circuit judge of the first circuit made an order requiring seventy-eight persons therein named "to enter into a recognizance to appear and testify before the grand jury of this court in the matter of an indictment about to be preferred against E. de Guzman and others for violation of Act 57 of the Laws of 1905," directing that "in default of the furnishing of such recognizance the parties above referred to be arrested and confined in Honolulu jail until the hearing of said matter before

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the grand jury and until after the hearing of any indictment which may be brought in and by said grand jury against said E. de Guzman and others for violation of the statute hereinbefore referred to" and commanding the sheriff of the City and County of Honolulu and other officers to enforce the order. In pursuance of the order fifteen of the persons named were arrested on board the American steamer Korea then lying alongside of the dock in the harbor of Honolulu as it was about to leave for San Francisco in the State of California, and were taken to Honolulu jail and there detained by the respondent, who is the jailer of that institution. Thereupon a petition was filed in this court on behalf of the fifteen, praying for the issuance of a writ of habeas corpus to test the legality of their detention.

The petition sets forth fourteen grounds of alleged invalidity of the order of detention, which may be summarized as follows: first, that the statute under which the order purports to have been issued is unconstitutional; second, that the order is unauthorized by the statute and is otherwise unauthorized by law; third, that at the time of the making of the order the fifteen persons, subsequently arrested, were beyond the jurisdiction of the court issuing it; fourth, that the persons arrested by virtue of the order were given no opportunity to appear before the court issuing it to give recognizance as required; and fifth, that the application of the attorney-general was based solely on information and belief and without knowledge on his part concerning the materiality of the evidence of the proposed witnesses.

The writ issued as prayed for. In his return the respondent admits the detention and seeks to justify it under the order of the circuit judge; alleges that there have been brought, and are now pending, criminal complaints in the district court of Honolulu against Frank B. Craig and two others for engaging in business as emigrant agents without first obtaining a license; denies that the attorney-general's application was based solely

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upon hearsay and sets forth with some detail the extent of the knowledge and information on the subject possessed by the attorney-general at the time of the making of the application.

The sworn application of the attorney-general, upon which the order in question was based, sets forth, *inter alia*, that that official "is informed and verily believes that one E. de Guzman and others have for a period of more than three months last past within the City and County of Honolulu, and elsewhere within the Territory of Hawaii, been recruiting laborers to work without the limits of the Territory of Hawaii, and acting within said Territory of Hawaii as emigrant agents without first having obtained a license so to do, as provided by law;" that the seventy-eight persons, subsequently named in the order and including the fifteen petitioners in this case, "are persons who have been induced by the said E. de Guzman and others to leave their employment within the Territory of Hawaii and go elsewhere, the same being laborers and the same being employed to go elsewhere as laborers without the Territory of Hawaii, and * * * are now * * * ready to depart from this Territory upon the first steamer that leaves Honolulu en route for California or the western coast of the United States, to-wit, the steamer 'Korea' sailing at 4 P. M. this day;" and that "said persons, above named, are material witnesses for the prosecution of a criminal indictment about to be preferred against the said E. de Guzman and others;" and prays for an order "that the several witnesses, whose names are given above, may be required by this court to enter into a recognizance to appear and testify before the grand jury of this court or before this court upon any indictment rendered by the said grand jury against the said E. de Guzman and others, and in default of their furnishing said recognizance that the said witnesses be confined within the Honolulu jail pending the hearing before such grand jury and before said circuit court upon such indictment if the same be returned and filed."

Of the grounds, as above summarized, for attacking the in-

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dictment the third has been expressly abandoned and in the view which we take of the matter the first, fourth and fifth need not be considered.

One of the contentions advanced on behalf of the respondent is that each of the circuit judges at chambers possesses, without aid of statute, inherent power to require of proposed witnesses recognizances for their appearance before the grand jury and at the trial and to commit them to jail in default of compliance. Some of the authorities express the view that this power is statutory only and has never been exercised in the absence of legislative grant. See, for example, *Comfort v. Kittle*, 81 Ia. 179; *Bickley v. Com.*, 25 Ky. 572; *In re Application of Clark*, 65 Conn. 17; *Ex parte Shaw*, 61 Cal. 58; 22 Pl. & Pr. 1343, and *In re Kawahara Yasutaro*, 15 Haw. 667. On the other hand it has been said or intimated that the power did exist at common law. See Underhill on Criminal Evidence, §254, and *Gwynn v. State*, 1 So. (Miss.) 237. Statutes upon the subject have been enacted in many, perhaps all, of the states. In England certain powers of this general nature were given by Stats. 1 & 2 Philip & Mary, c. 13, §5, and 2 & 3 Philip & Mary, c. 10, and later by 7 George IV., c. 64, §2, and 11 & 12 Vict., c. 42, §20. See *Evans v. Rees*, 12 A. & E., old series, 55, 58; Roscoe's Crim. Ev., pp. 115, 116; Wharton's Crim. Ev., §352, n. 3, and 1 Hale, Pleas of the Crown, p. 282. The statutes of George IV. (1827) and of Victoria (1848 & 1849) were enacted too recently to be regarded, in any possible meaning of that term as used in R. L., §1, as a part of the common law of England. Whether the early statutes of Philip & Mary (1553, 1554 & 1555) should be so regarded, or whether irrespective of those statutes the power existed at common law, need not be determined. The "common law" referred to by the above authorities, whether inclusive or exclusive of the statutes of Philip & Mary, gave the power to justices of the peace and coroners only and not to the courts of general jurisdiction corresponding in any degree to our circuit courts or

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judges, limited it at most to cases where an indictment had been found or where the accused on a preliminary examination had been committed for trial or held to await the action of the grand jury and authorize imprisonment only in the event of refusal of the witnesses to appear or to furnish recognizances as ordered. Underhill on Criminal Evidence, §254, 2 Hale, Pleas of the Crown, p. 282, and Roscoe's Crim. Ev., pp. 115, 116. In the case at bar at the time of the issuance of the order no indictment had been found or presented or filed in court or submitted to the grand jury for finding either against E. de Guzman or against any other person charged with the offense mentioned in the affidavit of the attorney-general, no person had been, after preliminary examination by the magistrate, committed for trial or held to await the action of the grand jury and the proposed witnesses were committed to jail without having been given any opportunity to furnish recognizances. The order did not define the amount of the recognizances. Even if, therefore, certain powers of this general nature existed at the common law, whether with or without the aid of the statutes of Philip & Mary, they were not such as to support the issuance of the order now under consideration, both because they did not relate to courts of a jurisdiction similar to that possessed by our circuit courts and judges and also because they could be exercised only in a mode and under circumstances not followed or existing in the case of these petitioners.

The statute mainly relied upon by the respondent is R. L., §1899, reading as follows: "Witnesses, commitment in criminal cases. The attorney general or the sheriff of the several circuits may require of any judge of a court of record, at chambers, that witnesses material to the prosecution of any criminal indictment preferred, or about to be preferred, be bound by recognizance to appear and testify at the trial of such indictment or that such witnesses be committed to jail for that purpose, and it shall be lawful for the judge, so applied to, to make any such order." It is unnecessary to say whether the prin-

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ciple that the enumeration of the one excludes all others applies in the construction of this statute in view of our ruling that our circuit judges, at chambers, do not, by any provision of the common law, possess powers sufficient to warrant the issuance of such an order as that in question. Under the terms of the statute the order there mentioned can only be made (1) when an indictment has been "preferred" or (2) when an indictment is "about to be preferred." Respondent concedes under the circumstances in this case that no indictment had been "preferred" within the meaning of the statute but claims that one was "about to be preferred," the argument advanced being, apparently, that the word "preferred" imports a presentation of the indictment for the purpose of being found, or in the alternative, a finding by the grand jury. Three possible constructions of the word suggest themselves, (1) that it refers to a formal presentation against the defendant in court, (2) that it refers to a filing in court for subsequent formal arraignment, and (3) that it refers to a submission to the grand jury for finding or rejection. What the correct construction is need not be determined, for even though that view be taken which is most favorable to the respondent the commitment is, in any event, invalid.

The order requires of the proposed witnesses recognizances "to appear and testify before the grand jury." What the statute authorizes,—and its language in this respect is clear—is a requirement to appear and testify "at the *trial* of such indictment." We are aware of no provision of the common law broader in this respect than the authority conferred by the statute. The "trial of such indictment" does not include an investigation by a grand jury which may or may not result in an indictment or trial. The order does, indeed, provide "that in default of the furnishing of such recognizance" the witnesses be detained "until after the hearing of any indictment which may be brought by said grand jury," but this cannot cure the defect. The witnesses cannot lawfully be detained for failure to com-

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ply with an order to furnish recognizances not authorized by law.

Section 1648 of the Revised Laws, conferring upon circuit judges at chambers the power to issue "all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law" is also referred to by the respondent as authority for the issuance of the order. This section does not enlarge the powers conferred by section 1899. The writs authorized are writs "according to law," and section 1899 names all the purposes for which recognizances may be required or commitments ordered by circuit judges.

Reliance is also placed upon the provision of section 83 of the Organic Act that "the several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts." This, we think, refers merely to the ordinary process of subpoena and the ordinary means of compelling obedience to such process and of punishing disobedience.

The power to bind over witnesses, by recognizance and by commitment to jail in default of such recognizance, to testify before grand juries as well as at trials, is essential to the due administration of justice in this Territory and legislation should be enacted providing for an extension, to this extent, of the remedy now furnished by our statute, subject always, of course, to proper limitations and safe-guards against the abuse of the power. (The writer deems it sufficient to say on this subject that if such an extension of the remedy is essential or desirable application for it should be made to the legislature.)

The petition for a writ of habeas corpus was signed by one Frank B. Craig on behalf of the fifteen persons already referred to and alleges that this course was followed "for the reason that it is impossible to obtain the signatures or oaths of said parties to a petition of a like nature in their own behalf,

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they having been denied by the hereinafter named Julius W. Asch (acting under the instruction, as petitioner is informed and believes and upon such information and belief alleges, of John W. Cathcart, Attorney for the City and County of Honolulu) the privilege of consulting counsel engaged to represent them or the right to affix their signatures to a petition prepared in their behalf directed to the Supreme Court of Hawaii, praying their liberty, which said petition so prepared said parties were and are willing and desirous of signing and having presented to said Supreme Court." The truth of this assertion was not denied in the return or in any of the evidence adduced. On the contrary it was attempted to be justified at the closing argument.

While no specific relief is asked of us in this respect we deem it appropriate to express our unqualified disapproval of the procedure complained of. One of the fundamental rights of every citizen is that of being represented by counsel in judicial proceedings and in this instance it is immaterial whether the request for the employment of counsel originated with the petitioners themselves or with some one else in their behalf. Impediments to the free exercise of this right by persons in the situation in which these petitioners found themselves are intolerable.

The order of the circuit judge is unauthorized by law and invalid. The petitioners are discharged.

E. M. Watson for petitioners.

W. A. Kinney, S. M. Ballou and R. W. Anderson (Kinney, Ballou, Prosser & Anderson on the brief) for respondent.

Campbell v. Steiner, 20 Haw. 455.

MARSTON CAMPBELL, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, *v.* JAMES STEINER, MRS. THERESA LOUISSON, THE FIRST NATIONAL BANK OF HAWAII, AN HAWAIIAN CORPORATION HAVING ITS PRINCIPAL OFFICE AT HONOLULU, TERRITORY OF HAWAII, ELIZABETH J. MONSARRAT, R. W. SHINGLE, SIMPSON DECKER, JESSE M. McCHESNEY, ED. TOWSE, AND CHARLES W. ZEIGLER, TRUSTEES OF MYSTIC LODGE NO. 2, KNIGHTS OF PYTHIAS OF HONOLULU, MYSTIC LODGE NO. 2, KNIGHTS OF PYTHIAS OF HONOLULU, LIBERT HUBERT J. L. BOEYNAEMS, BISHOP OF ZEUGMA, VICAR APOSTOLIC OF HAWAII, ST. LOUIS COLLEGE ALUMNI ASSOCIATION, AN HAWAIIAN CORPORATION HAVING ITS PRINCIPAL OFFICE AT HONOLULU, TERRITORY OF HAWAII, JAMES F. MORGAN, JOHN SULLIVAN, JOHN BUCKLEY, JOHN DOE, MARY DOE, AND RICHARD ROE, UNKNOWN OWNERS AND CLAIMANTS.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED APRIL 10, 1911.

DECIDED APRIL 12, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COSTS—territorial officer exempt from.

In proceedings instituted by one as superintendent of public works on behalf of the Territory costs are not taxable against the plaintiff upon the sustaining of a demurrer on the ground that the Territory, and not the superintendent, should be the party plaintiff.

· OPINION OF THE COURT BY PERRY, J.

Upon interlocutory exceptions to the overruling of a demurrer in this case we have held that "the demurrer should be sustained without leave to amend and without prejudice to the right of the Territory or other governmental authority to institute such proceedings as may be advised," and remanded the

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cause for further proceedings not inconsistent with the opinion. Ante 365. Subsequently in the circuit court the plaintiff filed a discontinuance and three of the defendants presented bills of costs for taxation. The following questions have been reserved by the circuit court for the consideration of this court: (1) Has plaintiff the right to file a discontinuance after the former decision of this court directing the entry of judgment for the defendants on the demurrer? (2) Has the trial court "the right or duty to enter judgment on the pleadings?" (3) "Should costs be taxed at all against this plaintiff?"

The plaintiff has expressly abandoned in this court the claim of a right to discontinue, thus rendering unnecessary an answer to the first question. On the subject of costs, section 1 of Act 63 of the Laws of 1907 applies. "Neither the Territory nor any County or Municipality thereof or any officer acting in his official capacity on behalf of the Territory or any County or Municipality thereof, shall be taxed costs or required to pay the same or file any bond or make any deposit for the same in any case." The language of the statute is plain. No officer acting in his official capacity on behalf of the Territory may be taxed costs in any case. The facts are undisputed. The plaintiff sued not in his individual capacity but as superintendent of public works "acting on behalf of the Territory of Hawaii." The condemnation of land prayed for was solely for the benefit of the superintendent of public works representing the Territory of Hawaii. While the title and the allegations of the petition were insufficient, as we held, to render the Territory the party plaintiff, nevertheless the petition was that of an "officer acting in his official capacity on behalf of the Territory." See *In re Jew Yuen Mou*, ante 359, 360, 361.

Answering the reserved questions, the circuit court is advised that judgment should be entered as directed in our former opinion and order, and that costs should not be taxed against the plaintiff.

E. W. Sutton, Deputy Attorney General. for plaintiff.

Thompson, Clemons & Wilder and C. C. Bitting for defendants.

Brown v. Cornwell, 20 Haw. 457.

MAY K. BROWN, AND ARTHUR M. BROWN, HER HUSBAND, BLANCHE WALKER, AND JOHN S. WALKER, HER HUSBAND, *v.* JOSEPHINE L. CORNWELL, NELSON K. SNIFFEN, AND MAKAKOA SNIFFEN, HIS WIFE, HENRY C. HAPAI, AND ALICE HAPAI, HIS WIFE, GEORGE W. A. HAPAI, JR., BIRDIE DE BOLT, AND J. T. DE BOLT, HER HUSBAND, J. P. COCKETT, AND MARY COCKETT, HIS WIFE, LOUISA COPP, AND GEORGE COPP, HER HUSBAND, JOHN BAKER, AND JANE BAKER, HIS WIFE, KATE CORNWELL, AND HENRY WATERHOUSE TRUST CO.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

ARGUED APRIL 4, 1911.

DECIDED APRIL 17, 1911.

ROBERTSON, C.J., PERRY, J., AND CIRCUIT JUDGE WHITNEY
IN PLACE OF DE BOLT, J.

PARTITION—sale—mortgage.

Upon a sale of land in a suit for partition between tenants in common, where some of the moieties are subject to a mortgage, the mortgagee having been made a party to the suit, the land should be sold clear of the incumbrance, and the mortgagee's claim paid out of the shares of the proceeds belonging to the mortgagors.

SAME—proof of impracticability of partition—report of commissioner.

Where the allegation in a bill for partition that the premises cannot be partitioned without great prejudice has been traversed it must be proved, but the defendants cannot complain of a finding by the circuit judge, based upon and supported by the report of a commissioner, that the allegation has been proven, where the defendants were given an opportunity to adduce evidence on the subject but failed to.

PLEADING—ultimate facts.

An allegation in such a bill that a partition "cannot be made without great prejudice" is not objectionable as a mere conclusion. It is a proper statement of an ultimate fact.

SAME—prayer for partition.

Where, in a bill for partition, the prayer is for a sale of the land, and for general relief, a partition in kind may be decreed without a specific prayer therefor.

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SAME—bill in equity—signature of counsel.

The failure of counsel to sign a bill in equity may be taken advantage of, if at all, by motion; it is not a subject for demurrer.

OPINION OF THE COURT BY ROBERTSON, C.J.

In a bill for partition the plaintiffs alleged, in substance, that they and certain of the defendants, as tenants in common, owned certain lands situate in the District of Kula, Island and County of Maui; that the defendant Kate Cornwell held a mortgage upon one-half of the interest of the plaintiff May K. Brown; and that the defendant Henry Waterhouse Trust Company, Limited, held a mortgage on the interests of the plaintiffs May K. Brown and Blanche Walker, and the defendant Josephine L. Cornwell. The bill prayed that the exact shares, interests and claims of the parties might be determined; that a sale of the lands be ordered, and the proceeds of sale be divided according to the respective rights of the parties; and for general relief.

The appellants demurred to the bill on the grounds that it failed to state sufficient facts; and that it was uncertain and ambiguous in that it failed to show the nature of the title to or interests in the lands of either the plaintiffs or defendants. The bill was amended with respect to the statement of the respective interests of the parties in the lands.

The appellants, Henry C. Hapai, Alice Hapai and George W. A. Hapai, Jr., demurred to the amended bill on the grounds that it did not state a cause entitling plaintiffs to the relief prayed for; that it was ambiguous and uncertain in that it did not set forth "how or in what manner partition in kind cannot be made of said premises without great prejudice to the parties herein;" and that it was defective in that it was not signed by counsel. The demurrer was overruled, and the defendants, saving all rights of exception to the errors and insufficiencies of the amended bill, answered. Most of the other defendants also filed answers. Neither of the mortgagees, however, filed any

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pleading. It subsequently appeared in evidence that the mortgage of Kate Cornwell was paid off.

The appellants, in their answer, denied that the premises were incapable of partition in kind without great prejudice to the parties, and denied that it was necessary or proper to sell the lands.

Upon a hearing being had the circuit judge made an interlocutory decree which determined the respective interests of the cotenants in the lands in question, also that plaintiffs were entitled to have the lands partitioned, and by which a commissioner was appointed to examine the lands and to report to the court whether they were capable of being partitioned in kind without great prejudice to the parties. The commissioner reported that the lands "can not be partitioned between the parties without depreciating the value of the land as a whole, and almost certainly creating injustice between the various owners; and that the interests of all the owners will be best conserved by selling the lands and dividing the proceeds," and gave at length his reasons for the conclusion. The appellants excepted to the report "on the ground that it appears by the report that there was no notice or hearing of any party to the controversy, or their attorneys, and second, that there was no opportunity at a hearing for defendants to indicate that they consent to a partition of their several shares in one undivided lot to be set off to them together." At the hearing on the exceptions the judge stated that the parties "are not bound by the report, nor are the hands of the court tied. * * * Judge Weaver has made two requests and he will be allowed to put in any evidence with regard to those requests * * * the question is whether the property shall be sold or divided." Later, counsel for appellants objected to the taking of testimony on the subject, though he cross-examined the witnesses who were called by plaintiffs.

The circuit judge held that the premises were not capable of being partitioned without great prejudice to the parties, and we hold that that finding was amply supported by the evidence.

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A decree was entered ordering that the premises be sold in five separate parcels; appointing a commissioner to sell "the right, title and interest of each and all the parties hereto" in and to the lands, at auction, for cash, at twelve o'clock noon, on the 17th day of December 1910, after publishing notice of sale in the "Maui News," newspaper, once each week for four successive weeks; and directing that "the said commissioner shall pay the proceeds of sales into court and the same shall, after the payment of all costs of these proceedings and expenses of sale, including the fees of commissioners, be divided among the parties plaintiffs and defendants according to their respective interests as the same have been made to appear, provided that the shares of plaintiffs and of defendant Josephine L. Cornwell, shall be subject to said mortgage held by Henry Waterhouse Trust Company, Limited." At a subsequent hearing upon a motion of the appellants to have the sale postponed and re-advertised on the ground that the commissioner's notice of sale did not conform to this decree, which will be referred to presently, the circuit judge took the view that the clause referring to the mortgage contemplated that the sale of the premises was to be made subject to the mortgage. This view was, in our opinion, incorrect. At a glance it will be seen to be entirely inconsistent with that clause of the decree which directed the commissioner to sell all the right, title and interest of all the parties in the lands, which would have included the interest of the mortgagee.

The commissioner's notice of sale complied with the decree except that it omitted to state that all the interests of the respective parties would be sold, and that it contained this clause: "This sale is to be made subject to a mortgage of plaintiffs' interests held by Henry Waterhouse Trust Company, Limited, recorded in said Hawaiian Registry of Conveyances, in liber 309, page 273, said mortgage being dated August 1, 1908." On December 14th, the appellants, Henry C. Hapai and G. W. A. Hapai, filed a motion asking that the notice be quashed, and

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that a supplementary decree be made postponing the sale, and directing that notice be given in conformity with the terms of the decree, and that the lands be sold free of any incumbrance by reason of the said mortgage. The motion was overruled. On December 17th, Henry Waterhouse Trust Company, Limited, as mortgagee of said interests, filed a notice in and by which it offered to release from its mortgage the said five pieces of land for five separate amounts which aggregated the sum of \$6000. The commissioner reported the sale of the lands to one of the plaintiffs for sums aggregating a total of \$18,765. In support of the report the affidavits of two persons who attended the sale were filed in which it was stated that the prices bid for the lands were "fair and not disproportionate to the values thereof." The appellants excepted to the report on the grounds that the notice of sale did not conform to the decree in the respect above mentioned; that the sale of the premises subject to the mortgage was unjust to the parties other than the mortgagors in that it gave the mortgagors an inequitable advantage over the others in bidding at the sale; that the parties who were the mortgagors, in the division of the proceeds in accordance with the decree, would receive more than their just shares; and that the notice that the lands would be sold subject to the mortgage rendered the value of the insterests sold uncertain and speculative, and chilled the bidding. In connection with these exceptions an affidavit of the defendant, Henry C. Hapai, was filed in which it was deposed that the appellants had been greatly damaged by the notice of sale, and by reason of the fact that the lands had been sold subject to the mortgage, and because the bidding was thereby chilled, and that the price bid at the sale was unreasonable and inadequate. The exceptions were overruled, and a final decree was entered by which the commissioner's return was approved; the sales were confirmed; and the net proceeds, after deducting the costs and expenses, were ordered to be distributed among the late cotenants according to their respective shares in the lands

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No provision for the payment of the mortgage was made in the decree. From this decree the defendants Henry C. Hapai, G. W. A. Hapai, Nelson Sniffen and Alice Hapai, brought their appeal to this court.

The appellants' chief complaint is aimed at the action of the court below wherein their contention, urged both before and after the sale, that the property should be sold clear of the mortgage, and that the mortgagee's claims should be satisfied out of the shares of the proceeds of the mortgages, was overruled.

At the hearing upon the exceptions to the commissioner's report the judge assumed that the mortgage was not due and that, therefore, he was without power to order the land sold free of the incumbrance. The mortgage was not put in evidence and there was no testimony on the point as to whether or not it was due. We are of the opinion, however, that it was unimportant whether the mortgage had matured or not, for in either event the lands should have been sold clear of the incumbrance.

The authority of courts, in suits for partition, to order a sale of the land and divide the proceeds of sale among the cotenants rests entirely upon statute. Freeman, Partition, Sec. 479. Our statute (R. L. Sec. 1648) provides that, "when the partition of real estate cannot be made without great prejudice to the parties the judge may order a sale of the premises and divide the proceeds." Without such a statute, or even where such a statute exists, in case a partition in kind is decreed, the lien of a mortgage follows and attaches to that portion of the land which is set apart to his mortgagor. Freeman, Partition, Sec. 478. Where the statute, as here, authorizes the sale of premises sought to be partitioned, we think it follows, as a necessary consequence and without express provision, that the rights of a mortgagee must be relegated to the share of the mortgagor in the proceeds of sale, provided, of course, that the mortgagee has been made a party to the suit. We hold that to be the rule where, as in this case, the mortgage was executed by a portion

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of the cotenants upon their respective moieties. What the rights of the mortgagee would have been had its mortgage covered the entire premises and had not become due it is not necessary to decide. A person who takes a mortgage on an undivided interest in land must be presumed to understand that the owner of the other interest has the right to, at any time, ask for a partition of the land, and that he accepts the mortgage subject to the contingency of that right being exercised. *Milligan v. Poole*, 35 Ind. 64; *Hall v. Morris*, 76 Ky. 322; *Wright v. Strother*, 76 Va. 857. No injustice is done to the mortgagee when, under such circumstances, a sale of the premises free of the incumbrance is ordered, and the mortgagee's claim is fastened upon his mortgagor's share of the proceeds.

In this case the mortgagee was not only made a party, but it made no objection to the order of sale. It was bound by the decree. *Thurston v. Minke*, 32 Md. 571, 574. Indeed, the mortgagee is not contending that it is not bound by the decree. It is not for the plaintiffs, therefore, to say that the mortgagee had the right to insist that the land could not have been sold except subject to its mortgage. To sell the property subject to the mortgage and divide the proceeds between the parties in shares corresponding to their respective interests in the land, was to compel those who were not parties to the mortgage to contribute to its payment. Assuming, for the purpose of illustration, that the lands in question are worth the amount bid for them plus the amount which the mortgagee offered to take in release of its mortgage, the value would be \$24,765. Upon a sale in partition the several cotenants would naturally and justly expect to obtain in money an amount equal to the value of their respective interests in the land. But, according to the ruling of the circuit judge, these appellants must be contented to share in the division of \$18,765, instead of \$24,765, for the sole reason that some of their cotenants have seen fit to charge their interests with a \$6000 mortgage. The statement of the proposition shows that it is absolutely untenable.

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Furthermore, the commissioner's notice referred the public and possible bidders to the volume and page of the records where the record of the mortgage could be found. The testimony shows that reference to that record would have shown intending bidders the existence of an outstanding mortgage for \$30,000, although the testimony in the case tends to show that the mortgage indebtedness had been reduced to the extent of at least \$3000; and there had been no determination of what portion of the mortgage indebtedness was chargeable against these lands. The natural effect of the notice that the lands would be sold subject to the mortgage would have been to suppress competition and "chill" the bidding. From these facts it follows as an unavoidable conclusion that the proceedings were grossly irregular and unjust, and that the decree must be set aside.

The remaining points raised by the appellants will be noticed briefly.

The objections to the report of the first commissioner, and to the proceedings had thereon, were not well founded. The commissioner was not appointed to make partition of the lands. If he had been appointed for that purpose a hearing upon notice would have been necessary and the finding would have had the force of a verdict of a jury. *H. C. & S. Co. v. Waikapu S. Co.*, 9 Haw. 417; *Simpson v. Simpson*, 59 Mich. 71, 77. But this commissioner was authorized merely to examine the lands and to report to the court as to the practicability of a division in kind. His report was in the nature of an expert opinion, and merely advisory. It had no more force than the testimony of a witness. Not being controverted by other evidence, it furnished a sufficient basis for a finding by the court in accordance with the commissioner's conclusion. *Watke v. Stine*, 214 Ill. 563. That land sought to be partitioned cannot be divided in kind without great prejudice to the parties is a material allegation, and, unless admitted, must be proved. Upon that issue a defendant is entitled to adduce evidence. The defendants in this case were given an opportunity

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to offer evidence on the point after the report of the commissioner came in. They have no cause for complaint in this connection.

The allegation in the bill that a partition "cannot be made without great prejudice," is not objectionable as being a statement of "a mere conclusion." True, it is a conclusion, but it is a conclusion of fact—an ultimate fact—and a traversable fact. In pleadings it is necessary to allege only ultimate, as distinguished from evidential, facts. *McAllister v. Kuhn*, 96 U. S. 87; *Accident Association v. Munson*, 73 Neb. 858; *Puuheana v. Lio*, 5 Haw. 202. This rule has been applied to bills for partition which contained allegations similar to that involved here. *DeUprey v. DeUprey*, 27 Cal. 330; *Hayes v. McReynolds*, 144 Mo. 348.

The objection to the form of the prayer of the bill is not sustained. It is usual, and good pleading, in a bill for partition to pray for a partition in kind, and, in the alternative, for a sale of the land if it cannot be divided without great prejudice to the parties. But where the allegations of the bill are sufficient, and are sustained by the proofs, a partition in kind may be had under the prayer for general relief. *Croston v. Male*, 56 W. Va. 205, 214.

One of the grounds of demurrer was that the bill was not signed by counsel. In many jurisdictions it has been held that the practice in equity requires that bills shall be signed by counsel, and some authorities hold that the lack of such signature is a proper subject for a demurrer. We believe, however, that the proper method of taking advantage of the point is by moving to take the bill from the files. It is a matter of practice rather than of pleading. *Gove vs. Pettis*, 4 Sandf. Ch. 403; *Bernier v. Bernier*, 72 Mich. 43.

The appellees contend that the appellant Sniffen is not in a position to maintain an appeal because he has given a creditor an order on the commissioner for a portion of the proceeds of sale which represents his share in the land. It does not appear,

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however, that the order was accepted or that any money has been paid out pursuant to it. We think there is nothing in the point.

The decree appealed from is reversed, and the cause remanded to the circuit judge for further proceedings in conformity with this opinion.

C. C. Bitting and *J. L. Coke* (*Thompson, Clemons & Wilder* and *Douthitt & Coke* on the brief) for plaintiffs.

P. L. Weaver and *Eugene Murphy* (*L. Andrews* on the brief) for appellants.

D. W. Burchard for certain defendants.

No. 38. *DON ROBINSON v. HONOLULU RAPID TRANSIT & LAND COMPANY*. Exceptions from Circuit Court, First Circuit. Petition for Rehearing. Filed April 15, 1911. Decided April 18, 1911. Robertson, C.J., Perry and De Bolt, JJ. Per curiam: The defendant's petition for a rehearing is based on three grounds: (1) That the decision of the court is in conflict with the statute, R. L., Sec. 1798; (2) That it is in conflict with certain controlling decisions to which, through neglect of counsel, the attention of the court was not drawn; (3) That questions decisive of the case, and duly submitted, were overlooked by the court. The section of the statute referred to contains the provision that it shall not "be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of evidence, and the granting of a new trial therein." The leading feature of the statute is the requirement that all questions of fact shall be submitted to the jury for their determination without any comment upon the credibility of the witnesses or the weight of the evidence by the trial judge. That being so, a legislative intent that the trial judge should have the power to review the finding of the jury on the facts would necessarily

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have to be expressed in unambiguous terms. We hold that the proviso above quoted cannot be construed, in the manner contended for by counsel, as authorizing a trial judge to set aside a verdict simply because in his judgment it is against the weight of the evidence, where there is some substantial evidence to support it, and the verdict has not been attacked on any other ground. In other words, in a case where the verdict is supported by more than a scintilla of evidence, it is not "a proper case" in which to set aside the verdict on the sole ground that it is against the weight of the evidence.

As to the second ground, it is sufficient to say that the court overlooked no controlling authority, and no such authority is now called to our attention.

Upon the third ground, counsel seek to reargue, upon the evidence, the questions of negligence and contributory negligence. Suffice it to say that we are satisfied that the case was correctly decided, and that we see no reason for reopening it. The petition is denied without argument under Rule 5.

G. A. Davis and A. L. C. Atkinson for plaintiff.

Castle & Withington and J. W. Cathcart for defendant.

DON ROBINSON v. HONOLULU RAPID TRANSIT &
LAND CO.

TAXATION OF COSTS.

ARGUED APRIL 27, 1911.

DECIDED APRIL 29, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COSTS—attorneys' fees—transcript of evidence.

Money paid for a transcript of evidence necessary to the consideration of a bill of exceptions may, under R. L., §1889, be taxed as costs against the losing party.

Id.—papers on appeal.

Each original exhibit and each certified copy of a pleading on an appeal to this court is a "paper" within the meaning of paragraph 1, section 1889, R. L., and is subject to a charge of twenty-five cents as costs.

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OPINION OF THE COURT BY PERRY, J.

The circuit judge's order granting the defendant's motion for a new trial having been set aside by this court (*ante* p. 426), the plaintiff now presents his bill of costs. Two items only are objected to, one of \$79.56 for money paid by the plaintiff for a transcript of the evidence to be used on the exceptions and the other of \$8.50 charged by the clerk under R. L. §1889, for filing thirty-four papers in this court.

Section 1889, R. L., authorizes the taxation as a part of "attorney's fees" of "all actual disbursements sworn to by the attorney, and deemed reasonable by the taxing officer." The case came originally to this court on an exception by the defendant to the denial of its motion for judgment non obstante verdicto based on the ground that the proofs adduced did not tend to sustain the case of negligence charged in the plaintiff's complaint; and on an exception by the plaintiff to an order setting aside the verdict on the ground that it was against the law and the evidence and the weight of the evidence. A transcript of the evidence was necessary, therefore, in order to enable the court to determine the merits of the exceptions. The outlay for this purpose was unavoidable and reasonable and may be recovered of the losing party under the provision above quoted.

The item of \$8.50 is part of a charge of \$17.25 included in the bill for "actual costs of supreme court," which latter has, since the filing of the bill, been reduced by the clerk to \$16.75. Section 1889, R. L., which admittedly applies to the supreme court as well as to the circuit courts (see also Act 44, L. 1905), provides for a charge of twenty-five cents as costs "for filing any petition, plea or other paper, at the request of either party." The thirty-four papers included certified copies of the pleadings and other documents and the original exhibits, filed in this court as a part of the record on appeal. The statute provides no separate charge for the filing of a record on appeal as a whole. The language used "or other paper" is sufficiently

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broad to include each of the thirty-four documents for which the charge under consideration has been made.

The items objected to are allowed.

G. A. Davis and *A. L. C. Atkinson* for plaintiff.

D. L. Withington for defendant.

TERRITORY OF HAWAII *v.* TSUTAICHI KAWANO.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

ARGUED APRIL 10, 1911.

DECIDED MAY 5, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

OATH—administration of.

An oath administered to a witness by the clerk that the evidence he shall give "shall be the truth, the whole truth and nothing but the truth," omitting the invocation, "so help you God," which was correctly interpreted to the witness, the interpreter adding thereto the words, "so help you God," is valid.

EVIDENCE—cross-examination of interpreter.

The right to subject an interpreter, on the witness stand, to cross-examination on the foreign expressions and terms used by him as interpreter, or used by the witness for whom he has acted as interpreter, is a right well recognized by law, and is founded upon the general rules and principles which govern cross-examination of other witnesses.

TRIAL—remarks of court—argumentative instructions.

Remarks and instructions of the court to the jury which are argumentative comparisons relative to the credibility of witnesses, commending one and disparaging the other, their testimony being vital and diametrically in conflict, are unfair, prejudicial and erroneous.

TRIAL—instructions, theory of.

Instructions are given on the theory that they are expositions of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict responsive to the evidence adduced. They should be pointed, concise and definite, covering, however, the whole case, i. e., "the points of law involved therein." R. L. Sec.

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1801. They should not be ambiguous, inconsistent or contradictory; nor should they extend to abstract propositions of law.

The court has no right to attempt to discredit instructions already given.

OPINION OF THE COURT BY DE BOLT, J.

The defendant (plaintiff in error) having been convicted of the crime of perjury in the circuit court of the second circuit and sentenced to imprisonment at hard labor for the period of eighteen months, brings the case here on a writ of error.

The perjury is alleged to have been committed at the hearing of certain interpleader proceedings brought by the sheriff before the circuit judge of the second circuit, at chambers, for the purpose of having the ownership of a certain billiard table, held under a writ of attachment, judicially determined as between M. Daido and M. Nozaki. The defendant claims that Nozaki was the owner of the table and that he agreed to and did sell it to Daido; that Daido, not having the necessary funds with which to pay for the table, borrowed \$100 from the defendant for that purpose, giving him his note therefor; that the note not being paid at maturity, the defendant brought suit against Daido on the note and caused the table to be attached as the property of Daido. Upon the table being attached Nozaki filed with the sheriff a claim, stating that he, and not Daido, was the owner, whereupon the interpleader proceedings above mentioned were instituted. The prosecution contends that Nozaki did not sell the table to Daido, but that an arrangement was entered into between them to open a billiard hall, Nozaki furnishing the use of the table and Daido contributing his services, and the profits to be divided between them. The prosecution admits that Daido borrowed the \$100 from the defendant, but claims that it was borrowed for the purpose of sending it home to Japan, and that Nozaki had no knowledge of the transaction.

As to the testimony upon which the alleged perjury is predi-

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cated; the indictment charges that the defendant, on December 9, 1909, before the circuit judge, at chambers, as a witness in the interpleader proceedings,

"did then and there wilfully, knowingly, falsely and feloniously, in substance and effect, among other things, state and swear that, in Hana, Maui, on the 21st day of August, 1909, he Tsutaichi Kawano, loaned one hundred dollars to M. Daido; that thereafter, on and during the same day, upon the invitation of said Daido, he, Tsutaichi Kawano, and others, went to said Daido's house in Hana, the purpose being to celebrate the purchase from Masataro Nozaki by M. Daido of said billiard table; that when he, Tsutaichi Kawano, got to Daido's house, Daido took from his (Daido's) pocket the hundred dollars which he (Tsutaichi Kawano) had loaned to Daido that morning, and put it on the table, Daido as he did so saying to Nozaki: 'this is the final settlement for the transaction,' meaning thereby the purchase of the billiard table: That Nozaki took the money, and put it in his (Nozaki's) pocket, saying: 'this is the final transaction.' * * * Whereas, in truth and in fact, as the said Tsutaichi Kawano then and there well knew, said M. Daido did not, at his (Daido's) house, in Hana, Maui, on the 21st day of August, 1909, in the presence of Tsutaichi Kawano and others, take from his (Daido's) pocket the one hundred dollars which he (Tsutaichi Kawano) had loaned to Daido that morning, or any other sum of one hundred dollars, and put it on the table; Daido as he did so saying to Nozaki: 'this is the final settlement for the transaction,' meaning thereby the purchase of the billiard table; that in truth and in fact, as the said Tsutaichi Kawano then and there well knew, said Nozaki did not, at Daido's house, in Hana, Maui, on the 21st day of August, 1909, in the presence of Tsutaichi Kawano and others, take said one hundred dollars and put it in his (Nozaki's) pocket, saying: 'this is the final transaction.' That in truth and in fact, as the said Tsutaichi Kawano then and there well knew, he, the said Tsutaichi Kawano, did not see the sum of one hundred dollars, nor was the sum of one hundred dollars, paid or handed over by said Daido to said Nozaki, or received by said Nozaki from said Daido at or in said Daido's house, in Hana, Maui, on the 21st day of August, 1909."

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Fifty-eight errors are assigned, but in the view we take of the case it will not be necessary to consider all the questions presented.

The first assignment relates to the validity of the oath as administered by the clerk through the interpreter to the defendant as a witness in the interpleader proceedings. The oath was administered in the following manner, that is to say, while the clerk, the interpreter and the witness were all standing with their hands raised, the clerk said, addressing the witness: "You do solemnly swear that the evidence you shall give in this matter before this court shall be the truth, the whole truth, and nothing but the truth," omitting the invocation, "so help you God." The interpreter thereupon correctly interpreted the oath as repeated by the clerk, adding thereto the words, "so help you God," to which the witness assented. The oath, as thus administered, was the same in effect as if the clerk had used the words, "so help you God," in the first instance. The oath, in our opinion, is valid. *Com. v. Jongrass*, 181 Pa. St. 172.

The second, third, fourth and fifth assignments relate to the refusal of the court to permit counsel for the defendant to cross-examine the witness, Otsuka, who acted as the official Japanese interpreter at the hearing in the interpleader proceedings, and through whom the defendant as a witness in those proceedings was sworn and testified. Counsel sought to obtain from the witness, Otsuka, what he had said to the defendant in administering the oath to him, and also what the defendant had said to him relative to the supposed statements upon which the alleged perjury is based. Upon this phase of the case we quote from the record as follows, the interpreter being under examination as a witness called by the prosecution:

"Mr. Case: Will you tell—In interpreting that oath—will you tell us what you interpreted to Kawano? When you interpreted the oath to Kawano, what did you say?"

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"The Court: Why, that would be in Japanese. You can ask him if you wish if he interpreted or translated correctly.

"The Court: When you interpreted the oath, did you interpret correctly?

"A. Oh, Yes sir.

"The Court: Proceed.

"Mr. Prosser: I move that be stricken out on the ground that the best evidence is what he actually said in Japanese to the defendant and not a conclusion that he interpreted the oath correctly.

"The Court: The motion is overruled and you have an exception. I don't think I could judge the Japanese language. The witness has stated that he interpreted correctly. * * *

"Mr. Prosser: Mr. Otsuka, will you give in Japanese the words which you addressed to the defendant when you swore him?

"The Court: I don't know why you ask that question. The stenographer can't take it down and I don't believe the witness can answer the question. I am sure I will not understand it and am quite certain that you will not. The question is not allowed. * * *

"Q. I will ask you to give in the Japanese language the statements which you made to the witness or the defendant here, at this trial and the answers that he gave to you in that trial. * * *

"The Court: It is entirely a new thing to make this a Japanese Court. I want you to understand that this is an American Court and I ask you what authority you have for asking such a question. * * * I overrule the questions; I sustain the objection.

"Q. When Kawano told you, after taking the oath about which you have testified, that he saw the hundred dollars in ten gold pieces paid by Daido to Nozaki, your question to him and his answer to you were both in the Japanese language were they not?

"A. I translated from English to Japanese and Japanese answer I translated into English. * * *

"Q. Will you state in Japanese what the questions were that you asked the defendant and what his answers were?

"The Court: The objection is sustained, and you have an exception."

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As regards the refusal of the court to permit counsel to cross-examine the witness on the statements involving the question of perjury, it will be observed that the indictment charges, and the record shows that it was the theory of the prosecution throughout the trial, that the defendant, as a witness in the interpleader proceedings, testified positively and unequivocally that on the night of August 21, 1909, at Daido's house, Daido took \$100 from his pocket, put it on a table, saying to Nozaki: "this is the final settlement for the transaction," and that Nozaki took the money and put it in his pocket, saying: "this is the final transaction." The defendant contends that he did not testify positively as to those matters, but that he prefaced his statements with the explanation to Otsuka, the interpreter, that what he was about to testify to was what he believed to be true by reason of having been so informed by Daido. The witness, Otsuka, on direct examination had testified that the defendant made the positive statements as quoted in the indictment. Upon this phase of the case, as shown by the record, which we have quoted, counsel for the defendant on cross-examination sought to obtain from the witness Otsuka, what he had said in the Japanese language to the defendant and what the defendant had said to him in the Japanese language, while testifying as a witness in the interpleader proceedings, but the court would not permit the witness to answer. The ruling of the court in this regard was contrary to authority and reason, and it cannot be sustained. The right to subject an interpreter, on the witness stand, to cross-examination on the foreign expressions and terms used by him as interpreter, or used by the witness for whom he has acted as interpreter, is a right well recognized by law, and is founded upon the general rules and principles which govern the cross-examination of other witnesses.

In the case of *Schnier v. The People*, 23 Ill. 1, 22, the court held that where evidence was given through an interpreter, and there was a dispute as to the meaning of any word in the for-

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eign language, it was proper to require the interpreter to give the primary meaning of all words used in connection with the word in dispute, so that the jury would be able to determine its meaning in case of a disagreement among the interpreters; and the court was also of the opinion that other witnesses versed in the language should be permitted to testify as to the meaning of any important word. Upon this subject the court said:

"The object of all evidence is to inform the jury or tribunal to whom the issue is submitted, of all the facts in dispute, precisely as they occurred. The nearer that tribunal can, through the aid of evidence become eye and ear witnesses of the transaction, the nearer will they be enabled to do strict justice between the parties. Hence witnesses are required to detail what the parties did and said. And in detailing conversations, or admissions, the rules of evidence require that, as far as practicable, the language employed by the party should be detailed by the witness. It is by this means that the jury or court trying the issue is enabled to arrive at the intention of the party employing the language. When the language used by the party, and testified to by the witness, is understood by the triers, they can have no difficulty in arriving at the meaning attached to it by the person using it. But to do so, it is always desirable that the witness shall, as far as possible detail to the jury the very same language, in precisely the same connection, in which it was employed by the person using it, otherwise it will necessarily be merely an accident if the jury obtain the sense in which it was spoken. When the facts, conversations or admissions admissible in evidence, are known to a person who does not understand and speak the language in which the trial is conducted, then the only means by which the jury or court trying the issue can arrive at the facts, is from the evidence through an interpreter who understands and speaks both languages. And when he is so employed, it is his duty to translate the evidence given by the witness into equivalent terms of the language employed by the tribunal trying the cause. All persons are aware of the fact, that the power to make a literal translation from one language to another, so as to preserve in the translation the precise meaning of the original, depends upon the accurate knowledge of both languages by the translator. This being the

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office of an interpreter, if the person employed is not well versed in each language, he is liable to fail in giving the jury the facts, circumstances, conversations and admissions just as they were detailed by the witness, and if that is not done, the party against whom the mistake is made must suffer wrong, unless he shall be permitted to call others who are more capable of translating the language correctly. This, we think, is the right of the party. It cannot be the law that because an interpreter is called who is not capable of correctly translating the evidence, or from bias or partiality renders it incorrectly, that parties must be bound by it, although it may affect their most vital and important rights. In this case the witness was permitted to testify as to the sense in which he understood the accused to employ this term, and we can perceive no objection in permitting the accused to introduce evidence of the primary meaning of the word, and its meaning in the connection in which it was used. In all cases of such disputes, as to the meaning of a word in the foreign language, it would be proper that the court require the interpreter to give the primary meaning of all words used in connection with the word in dispute, that the jury might be enabled to determine its meaning in case of disagreement of the interpreters."

There seems to be no authority against the proposition for which the defendant contends; and, presumably by reason of the fact that a right so apparent and self-evident is seldom questioned, there are but few authorities to be found on the point. 17 Am. & Eng. Ency. Law, 30; *Ulrich v. People*, 39 Mich. 245, 251; *Thon v. Roch. Ry. Co.*, 29 N. Y. Sup. 675.

In the case at bar the vital question to be determined was, What did the defendant say in Japanese, and what was its equivalent in English, regarding the payment of the money by Daido to Nozaki? Had counsel been permitted to obtain from Otsuka the precise Japanese words used by the defendant it would have been a very simple matter to have tested the accuracy of Otsuka's translation by others versed in the English and Japanese languages; but, notwithstanding the vital importance of this right to the defendant, the court unhesitatingly permitted the testimony of Otsuka on this crucial point

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to go to the jury as elicited by the prosecution, denying the defendant the invaluable right to test it by cross-examination. Wigmore on Ev., §§1362, 1367. It is immaterial whether the translation as rendered by Otsuka was correct or not; the defendant had the absolute right to test that translation with the view of showing that it was inaccurate, if such were in fact the case. Not until it has been definitely established what the defendant actually said in the Japanese language as to the money transaction of August 21, 1909, i. e., whether he swore that he actually saw the transaction, or was only relating what Daido had told him, can it be said with that moral certainty, which the criminal law requires, that he has committed perjury. The record before us leaves this important question in doubt. We all know how difficult it is to relate with exactness what we may have heard in our own language; and the difficulty and danger of mistake is greatly increased when statements must pass from one language through the medium of an interpreter into another language. To interpret or translate from one language to another with accuracy and reasonable safety requires a high degree of efficiency in both languages. The circuit judge said, and the record before us bears him out in the statement, that Otsuka, who acted as interpreter in the interpleader proceedings, did not "talk English well."

The court also should have allowed counsel to cross-examine the witness as to the oath.

The sixth assignment is based upon the ruling of the court in permitting the prosecution, over the objection of the defendant, to introduce in evidence the stenographer's transcript of the testimony supposed to have been given by the defendant as a witness in the interpleader proceedings. In those proceedings the defendant, as we have already observed, testified through an interpreter and his testimony was taken down in shorthand as translated by the interpreter. The prosecution introduced the transcript, as it was claimed, to show the materiality of the testimony of the defendant as given in the in-

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terpleader proceedings. This, it is urged, was error. As the case must be remanded for a new trial on other grounds, and as this question need not arise again, owing to the ease with which it may be avoided by calling the interpreter as a witness to prove the correctness of his interpretation preliminary to offering the transcript in evidence to show the materiality of the testimony, we deem it unnecessary to express any opinion on the ruling of the court in admitting the transcript in evidence without proof of its correctness in the way suggested. But we desire to point out that this evidence having been offered and received for the purpose of showing the materiality of the alleged false testimony, a question addressed to the court, the jury should have been instructed that the transcript was not to be considered by them as evidence of the truth or falsity of the defendant's statements. *Higgenbotham v. State* (Tex.), 6 S. W. 201; *People v. Macard*, 109 Mich. 623, 629; *State v. Vandemark*, 77 Conn. 201, 206; *State v. Justesen* (Utah), 99 Pac. 456.

The seventh, eighth and tenth assignments, relating to the cross-examination of the witness Otsuka and the remarks of the court made in that connection, as well as the forty-ninth assignment, relating to an instruction of the court given by its own motion to the jury (instruction "F") will be considered together as they present substantially the same questions. We quote from the record as follows:

"Q. Is it not a fact that you were discharged from the position because you were incompetent?

"A. No, sir. Never.

"Q. Now, I will ask you if it is not a fact that in this very court-room in the month of August last you were told by the Judge that he didn't have any confidence in you and didn't want you to be here at all?

"A. In August?

"Q. Is that not so?

"A. Yes, sir.

"The Court: I don't think that is fair to the interpreter as it leaves an unjust impression with the jury."

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"The Court: I don't think that I said that; but I did say that he didn't talk English well. He had a habit of coming into the Court room and listening to the cases and waiting to be called as interpreter and I called him down time and time again. All the interpreters did the same thing and I got angry, but I never questioned his honesty or integrity."

"The Court: I ask counsel to make an explanation because it is due both to myself and to the witness because it was not true in the sense he has stated. I made it a rule that I would not have them waiting for jobs as interpreters. That is what I referred to. I would not have him hanging around for a job.

"Mr. Prosser: I take exception to the court's remarks in the presence of the jury.

"The Court You may have an exception, and I wish you would take your seat."

"The Court: Have you any more witnesses with regard to the exception made by the Court with regard to the Interpreter Otsuka? Do you think it is due to the Interpreter to make an explanation of what I stated?

"Mr. Prosser: I think that is within the jurisdiction of the Court. This very feature was anticipated by me at the time that I filed my suggestion of disqualification. I thought at the time that it would be necessary for Your Honor to appear as a witness in the case.

"The Court: The Court will not appear as a witness. There has been some testimony that the Court is not always careful. There seems to be an attack upon the interpreter, although Judge Kepoikai stated as much as I can state. And I will say this that I have no memory of a definite statement except in a general way. * * * He has been here since last August."

(Instruction F): "If the jury agree with the position taken by the defendant that the court interpreter Otsuka did not honestly or did not honestly and correctly interpret to the witness defendant the questions that were asked the defendant and did not or did not honestly and correctly interpret what defendant said in reply to those questions,—in other words, if the said interpreter Otsuka falsely interpreted the testimony in that case and that the testimony or alleged testimony is a pure fabrication, then you should at least be able to find some motive

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for such a wicked act on the part of the interpreter. If by your verdict you show that the court interpreter Otsuka has committed perjury in this case, you ought to find if you can some motive for his action, for sane men do not act without some motive."

By this instruction together with the remarks as quoted above, the court, in effect, told the jury that in order to acquit the defendant they must necessarily conclude that Otsuka had deliberately committed perjury himself; and the court, it will be observed, thereupon cautioned the jury that before reaching the conclusion that Otsuka was a perjurer they should find some motive on his part for the commission of such a "wicked act," because "sane men do not act without some motive;" thus eliminating every possibility of a finding of an honest mistake on his part. However forceful and appropriate this language might have been as an argument by counsel, the use of such language by the court was not only improper but it was unfair and prejudicial to the defendant. As we read and construe the remarks and the instruction, they constitute an argumentative comparison upon the relative credibility of the defendant and Otsuka where their testimony was vital and diametrically in conflict. The court in plain terms said of Otsuka, "I never questioned his honesty or integrity," thus commending him to the jury as a witness upon whom they could safely rely, thereby disparaging the credibility of the defendant. Section 1798, R. L., provides that "the jury shall in all cases be the exclusive judges of the facts * * * and the judge * * * shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the * * * reliability of any witness." These provisions were violated by the judge in the case at bar. The remarks of the court and the giving of the instruction were clearly erroneous. *Territory v. O'Hare*, 1 N. D. 30, 48; *McMinn v. Whelan*, 27 Cal. 300, 320.

The fifty-fourth assignment relates to instruction "K,"

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given to the jury by the court of its own motion. After having instructed the jury at length as requested by the prosecution and the defendant, the court then gave the instruction complained of, saying:

"Gentlemen of the jury, you have the evidence and have heard able counsel and have been given many instructions on points of law. It has seemed to me that often juries are more confused than enlightened by the instructions read to them. Their attention is too much directed to fine points and legal distinctions in oft repeating and over-lapped instructions that courts feel bound to give because counsel demand them and it is the law. Yet their application and necessity are doubtful. Do not despair if you do not all understand alike all or any of the instructions and believe me that the more you study law the less you will agree about many of them. The considering and the understanding and the agreeing about the instructions is not the aim or object of your present service. You will not perhaps be under the necessity of at all referring to them. It is the guilt or innocence of the defendant that concerns you. So think of the evidence and decide as you think you should, remembering that if you have a reasonable doubt as to any material thing necessary to constitute guilt, you give the defendant the benefit of it.

"I believe you know what constitutes perjury as well as I do and knew it before you ever heard my voice. You know what is meant by a material fact; you know what is meant by oath, court, cause, case, issue, wilful, knowingly and maliciously, and the other terms we often struggle to define until they are but kernels in a mass of chaff in the minds of the average jurymen. Be not discouraged and do not confuse the fact that you do not understand all these terms with the idea that you do not understand enough to decide this case. And do not think that you must understand and be able to see the reason of the acts of defendant so as to see a good and a sufficient cause for them or else you are in a state of reasonable doubt so often referred to. There is a vast difference between not understanding everything and not knowing anything. Not to understand the reason for an act or see its reasonable cause is different from being in a state of reasonable doubt. There is no good and sufficient reason for any sin and it is in a sense unaccountable and

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unexplainable, but yet we know sin exists, and as to many sinful acts we may not be in a state of reasonable doubt. The reasonable doubt that is to cause you to give its benefit to the defendant is a doubt of that kind arising out of the evidence, or a want of evidence; not one raised by declaration of counsel and not one raised by want of power to remember and fully understand all the court's instructions. The evidence, the facts proven by it, and their relation to the great question of guilt, or innocence is what specially concerns you. If looking at the evidence you are in doubt as to the law applicable, then call to mind the instruction which governs, and if there is none or you want further explanation on a point of law the court will give it to you.

"The court has confidence in your ability as well as in your integrity and does not doubt but what you can and will come to a correct conclusion and a just verdict.

"Do not be confused with attempts to define legal metaphysical terms and do not go to your jury room with minds bound in fetters and chains made up of words, words, words, supposed to be for the purpose of enlightening your minds as to the legal principles applicable to the case. You need not be fettered, but can be free and with clear unfettered and unbound minds look you at the stubborn facts you find proven on this trial and decide as you find right and justice requires."

We cannot approve of this method of instructing a jury. The court having instructed the jury at length as requested by counsel, those instructions became the law of the case, and the court was in duty bound to assume that they correctly stated the law applicable to whatever state of facts there was evidence tending to prove, otherwise they should not have been given. The court had no right to attempt to discredit the instructions already given. Instructions are given on the theory that they are the exposition of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict responsive to the evidence adduced. They should be pointed, concise and definite; covering, however, the whole case, i. e., "the points of law involved therein," R. L. Sec. 1801. They should not be am-

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biguous, inconsistent or contradictory; nor should they extend to abstract propositions of law.

Whatever might be said in favor of some of the matters mentioned by the court in the instruction now before us, or however appropriate a consideration of the matters involved in them by the legislature might be, a discussion of such matters is entirely out of place in a court of justice. They have no application to trial by jury under our present system of procedure. Instructions of the character in question are not only erroneous but they tend to confuse and mislead the jury. The court, therefore, in giving this instruction committed error.

Other errors assigned need not be considered as they involve questions which probably will not arise at the new trial, or, if they do, will arise under different circumstances.

The judgment of the circuit court is reversed and the defendant is granted a new trial.

D. H. Case, County Attorney of Maui (Alexander Lindsay, Jr., Attorney General, and Enos Vincent, Deputy County Attorney of Maui, with him on the brief), for the Territory.

M. F. Prosser (Kinney, Ballou, Prosser & Anderson on the brief) for defendant.

IN THE MATTER OF THE APPLICATION OF FRANK
B. CRAIG FOR A WRIT OF HABEAS CORPUS.

ORIGINAL.

SUBMITTED MAY 4, 1911.

DECIDED MAY 15, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TERRITORIES—*legislative powers under Organic Act.*

By section 55 of the Organic Act the Legislature of this Territory was vested with the power of taxation and also the right to legislate in exercise of the police power.

CONSTITUTIONAL LAW—*taxation and regulation of business of emigrant agent.*

In Re Craig, 20 Haw. 483.

The business of emigrant agent is one which may lawfully be regulated as well as taxed.

Act 48 of the Session Laws of 1911, constitutes a lawful exercise by the Legislature of the power of taxation and of the police power and so far as the petitioner in this case is in a position to raise constitutional objections to its validity it is held to be not unconstitutional.

Constitutional objections to a statute will ordinarily not be considered when raised by a person whose rights are not affected.

OPINION OF THE COURT BY ROBERTSON, C.J.

The petitioner, Frank B. Craig, a citizen of the United States, was arrested and incarcerated at the police station, at Honolulu, by the sheriff of the City and County of Honolulu, pursuant to a warrant of arrest issued by the district magistrate of Honolulu, on the 7th day of April, 1911. The warrant was based upon a sworn complaint which charged that the petitioner and one J. C. Bell, on the 6th day of April, A. D. 1911, "did unlawfully engage in soliciting, inducing, procuring and hiring laborers to go beyond the Territory of Hawaii, and did then and there act as emigrant agents in that at the time aforesaid and place aforesaid, they, the said Frank B. Craig and J. C. Bell, did engage in soliciting, inducing, procuring and hiring certain laborers, residents of Honolulu aforesaid, more than thirty in number, but whose names are to deponent unknown, to go beyond said limits of the Territory of Hawaii, without obtaining a license so to do as by law provided and required, then and there and thereby violating Section 2 of Act 48 of the Session Laws of 1911 of the Territory of Hawaii."

The petitioner applied for a writ of *habeas corpus*, and the same was issued and made returnable before this court. By certain oral rulings made in open court certain allegations contained in the respondent's return and certain other allegations contained in the petitioner's answer to that return were struck out on the ground that they were mere conclusions of law or otherwise immaterial. That the petitioner was arrested and imprisoned pursuant to the warrant, as alleged, is admitted.

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The questions presented for determination are whether, on any of the grounds advanced by counsel for the petitioner, the statute is invalid, and, as to some of those grounds, whether the petitioner is in a position to urge them.

The first, second and ninth sections of Act 48, of the Session Laws of 1911, read as follows:

"Section 1. Any person who individually or acting through or for another or others, is engaged in soliciting, inducing, procuring or in hiring laborers to go beyond the limits of the Territory of Hawaii, whether under promise of employment or otherwise, shall be deemed an emigrant agent within the meaning of this Act."

"Section 2. No person shall engage in business as an emigrant agent without first obtaining a license from the Treasurer of each county or city and county in which such business is entered into or carried on. No such license shall be issued until the applicant therefor shall have complied with the following conditions:

"First: He shall file with said Treasurer a sworn statement of the person or persons employing him and the place to which it is proposed that laborers shall be sent or taken and of the nature, terms and conditions of the employment or inducements to be given laborers he may recruit.

"Second: He shall file with said Treasurer a bond in the penal sum of Twenty-five Thousand Dollars (\$25,000.00) running to said Treasurer and his successors in office conditioned that he will in all respects comply with the provisions of this Act and that he will satisfy any judgments which may be rendered against him in any action either at common law or under statute for enticing, inducing or persuading laborers from their employers or for inducing laborers to break their contract of employment.

"Third: He shall pay an annual license fee of Five Hundred Dollars (\$500.00).

"Every such license shall be issued subject to all rules, regulations, conditions and restrictions which may be subsequently imposed by law."

"Section 9. Any person who shall engage in business as an emigrant agent, without first obtaining a license as in this Act provided, or who shall violate any provision of this Act, shall be

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guilty of a misdemeanor, and upon conviction shall forfeit his license, if he has one, and shall be punished by a fine not exceeding One Thousand Dollars (\$1000.00) or by imprisonment for not more than one year, or by both such fine and imprisonment."

The other sections of the statute impose restrictions and conditions upon the business and operations of emigrant agents.

Section 3, provides for the registering in the office of the treasurer of the Territory of the name, age and nationality of each laborer recruited; the name and address of the last employer of such laborer, and certain other information, and authorizes a charge of fifty cents for registering each name. Section 4, provides that every emigrant agent shall give a bond in the sum of one hundred dollars to each laborer conditioned for the faithful performance of any contract or promise made with or given to any laborer, a duplicate original of which to be filed in the office of the treasurer. Section 5, forbids the recruiting of any minor without the written consent of his parents or guardian, or, if the minor have no parent or guardian, then of the attorney-general. Section 6 (as amended by Act 83, Laws of 1911), provides that no emigrant agent shall induce, entice or persuade, or attempt so to do, any servant or laborer who shall have contracted to serve his employer for a specific length of time, to leave such service for the purpose of leaving the Territory without the consent of the employer, nor shall he aid or abet any such servant or laborer in leaving said service and the Territory without such consent. Section 7, provides that the sureties on any bonds given under the provisions of the act shall justify as resident freeholders of the county and as worth in real estate situate in the county the amount of the bond over and above all liabilities, and that such bonds shall be subject to approval as to form and sufficiency by the treasurer. Section 8 (as amended by said Act 83), authorizes the treasurer, in case of any breach of condition of any such bond, to enforce such bond in any court of competent jurisdiction for the use and benefit of the person injured by such breach. Section 10, repeals Act 57

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of the Laws of 1905, except as to rights accrued thereunder and acts done in violation thereof. And section 11, requires persons holding licenses under the act of 1905 to comply with the provisions of this act except that payment of the license fee shall not be required during the unexpired term of any license held under the prior statute.

The validity of the statute is assailed on the following grounds: (1) That the license fee required by the statute is wholly unreasonable, and, as an exercise of the police power is void because of its restrictive and prohibitory character. (2) That the statute is in conflict with the provisions of section 10 of the Organic Act, that no suit shall be maintained for the specific performance of any contract for personal labor or service, and that no remedy shall exist for the breach of any such contract except a civil suit for damages for such breach. (3) That it is in conflict with the interstate commerce clause of the Constitution. (4) That it abridges the freedom of speech and of the press in violation of the First Amendment of the Constitution. (5) That it is in conflict with the Fourteenth Amendment because—(a) It restricts the right of the citizen to move from this Territory to another or other parts of the United States, and so abridges his privileges and immunities. (b) It denies to persons within the Territory the equal protection of the laws, and is arbitrarily and unreasonably discriminative, inasmuch as the business of hiring persons to labor within the Territory is not subjected to a like or any tax, or to any regulations whatsoever; and because other persons duly licensed under section 1418c of the Revised Laws, are engaged in this Territory as general emigrant agents, and who are legally authorized to carry on the same business as that defined in the statute in question without being required to pay the license fee required by this statute and without being bound by its regulations and requirements. (c) That the statute unduly restricts the right of the citizen to contract, and amounts to a prohibition of the right to carry on a lawful

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calling and occupation, thereby depriving the petitioner of his property without due process of law. (d) That the statute is class legislation, discriminating arbitrarily and without reasonable basis. (6) That it is in conflict with the Fifth Amendment in that it unduly restricts the right of contract, and amounts to a prohibition of the right to carry on a lawful occupation, and deprives the petitioner of his property without due process of law. (7) That the act in question is one of three statutes, the other two being Acts 67 and 70 of the Session Laws of 1911, which, taken together, establish in this Territory a system of involuntary servitude. (8) That the alleged unconstitutional features of the statute are so connected with the general scope of the act that the whole should be held invalid.

The respondent disputes all those contentions, and asserts that, as the petitioner does not claim to have paid or tendered the amount of the license fee required to be paid by section 2 of Act 48, he is not in a position to raise any question but that of the validity of the single requirement as to the fee and, that, in any event, because the petitioner never obtained a license under this statute he should not be allowed to raise any question as to the validity of any of the conditions or restrictions imposed by the statute upon licensees.

As to the point that because the petitioner does not claim to have paid or tendered the amount of the license fee he should not be heard to question the validity of any part of the statute except that relating to that fee. There would seem to be some merit in this contention though it is not necessary to pass upon it. *City of Fort Smith v. Scruggs* (Ark.), 69 S. W. 679, 682; *Wells v. Torrey*, 144 Mich. 689; *In re Atcherley*, 19 Haw. 535, 541. But in view of the fact that among the averments of the answer to the return, which the court ordered to be stricken out, were allegations under which the petitioner sought to show that he held an emigrant agent's license under the act of 1905, which is recognized and protected by the provisions of the

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eleventh section of the statute under review, we think that the petitioner should be accorded the benefit of the assumption which we shall indulge for the purposes of this case only that he is in the position of one holding a valid license under the act of 1905, which is equivalent to that of having tendered the amount of the fee under the present act. We shall, therefore, consider and pass upon the validity of each of the requirements of section 2 of this act.

As to the point that because the petitioner never obtained a license under this statute he is not in a position to urge any objection to the validity of any of the provisions of the statute which impose restrictions upon persons holding licenses under the act. In this connection it must be noted that the bond required to be given by an applicant for a license shall, according to the "second" sub-section of section 2, be conditioned "that he will in all respects comply with the provisions of this Act." Unless a licensee, after having given such a bond, could, in defense of an action for the breach of the conditions of such bond, set up the invalidity of the provisions of the sections of the act following section 2, it would seem that he ought to be heard upon such matters before the giving of the bond. Counsel for the respondent contend that such a defense would be open to the obligors in an action on the bond. That is at least doubtful. *Daniels v. Tearney*, 102 U. S. 415; *State v. Stark*, 75 Mo. 566; *Territory v. Tue Bun*, 20 Haw. 267. And we think it would not be inappropriate to consider all questions which the petitioner may be in a position to urge irrespective of the point here made. *Gundling v. Chicago*, 177 U. S. 183; *Fischer v. St. Louis*, 194 U. S. 361, 372.

On the other hand, some of the questions presented by the petitioner will not be considered for the reason that he is in no wise interested in or concerned with them. Within this category fall the petitioner's points above numbered 2, 5 (a) and 7, which, as the petitioner does not claim to be a laborer or servant, cannot affect any rights of his. Likewise as to the

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point numbered 4, in which connection it is urged that the statute would prevent a delegate of a labor organization from advising laborers to leave the Territory for the purpose of bettering their condition; and would apply to a tourist agent soliciting laborers to take a pleasure trip beyond the limits of the Territory, and to a newspaper publishing an advertisement of employment to be had elsewhere in the United States. The petitioner does not claim to be either a delegate of a labor organization, a tourist agent, or a newspaper publisher. A statute must be assumed to be valid until some one complains whose rights it invades. Though it may be said that an unconstitutional statute must be wholly void, yet it is well settled that the objection of unconstitutionality will be listened to only when it is made by one having a legal interest in defeating the statute. *Clark v. Kansas City*, 176 U. S. 114; *Cronin v. Adams*, 192 U. S. 108; *Hatch v. Reardon*, 204 U. S. 152; *Territory v. Miguel*, 18 Haw. 402.

Proceeding, then, to the consideration of the questions presented for our determination, the first point is, that the license fee required by the statute is unreasonable and void because of its restrictive and prohibitive character. The Congress of the United States, through the Organic Act (Sec. 55), empowered the legislature of this Territory to enact "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable." The power of taxation, therein included, was conferred upon the local legislature with all the completeness and effectiveness with which that power is vested in and exercised by the legislature of any of the States. *Peacock v. Pratt*, 121 Fed. 772. So also was the right to legislate in exercise of the police power conferred. *Territory v. Guyott*, 9 Mont. 46.

Attacks upon the validity of any statute enacted by the legislature of the Territory in the exercise of either of those powers will, therefore, fail unless it appears that some provision of the Federal Constitution or a statute of the United States has

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been trenched upon. *Walker v. New Mexico, etc., R. R. Co.*, 165 U. S. 593, 604. There is no good reason why a single statute should not include the exercise of both the power of taxation and the police power. In the case of *Gundling v. Chicago*, in which was involved the validity of an ordinance of the City of Chicago prohibiting the sale of cigarettes by any person without first procuring a license, paying a license fee, furnishing a bond, and complying with certain other conditions, the Supreme Court said, "It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an exercise or privilege tax" (177 U. S. 189). And in the case of *Williams v. Fears*, 179 U. S. 270, where the constitutionality of a statute of Georgia, which imposed just such a license fee upon emigrant agents as that involved here, was sustained as a valid tax, the court said, "It would seem, moreover, that the business itself is of such a nature and importance as to justify the exercise of the police power in its regulation" (p. 275). A business may be both regulated and taxed under the one statute.

In addition to *Williams v. Fears*, which must be regarded as a conclusive authority in support of the validity of the license fee provided for by section 2 of this statute, reference may be made to the following cases in which the rulings there made have been followed. *State v. Hunt*, 129 N. C. 686; *State v. Roberson*, 136 N. C. 587; *Kendrick v. State* (Ala.), 39 So. 203; *State v. Napier* (S. C.), 41 S. E. 13. Those cases hold that the business of emigrant agents is one which may be taxed and also regulated.

Counsel for the petitioner cite the cases of *State v. Moore*, 113 N. C. 697, and *Joseph v. Randolph*, 71 Ala. 499. An examination of those cases shows that neither of them is an authority against the validity of the tax imposed by our statute. The statutes there considered differed in material particulars from ours, and in so far as those cases contain any expressions at variance with the later cases above referred to they must be

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considered as having been qualified or disapproved by them.

It is contended that the amount of the license fee is unreasonable. It being settled that the business of an emigrant agent is one which may lawfully be subjected to the payment of a tax, it is not for this court to say that the rate which the legislature has fixed, is too high. The determination of the amount or rate of a tax is purely a legislative function. *Cooley on Taxation* (2nd ed.) 5; *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCray v. United States*, 195 U. S. 27; *State v. Roberson*, supra, at page 590.

It would seem to be beyond the reach of successful argument to the contrary that the business in question is one which may very properly be subjected to careful, precise, and reasonable regulation. In *State v. Napier* the court said, "It is easy to see that the business is of such a nature that the legislature might well see fit to thus regulate it, not only for the protection of the agricultural and manufacturing interests of the State, but for the protection of the laborers themselves against the acts and solicitations of designing and irresponsible persons." See also, on this point, *State v. Moore*, 113 N. C. 697. What was said in those cases applies with much force to this Territory. For many years past the successive governments of these Islands have spent, and the present government is now spending, large sums of money for the purpose of attracting hither desirable immigrants of the laboring and agricultural class. The material welfare and progress of this Territory require an adequate supply of labor. Such supply can be obtained only from distant countries at heavy expense to our taxpayers. The immigrants, being generally impecunious and sometimes very ignorant, finding themselves among strangers in a strange country, are peculiarly susceptible to such glittering representations as may be, and perhaps often are, held out by irresponsible labor agents. The legislature was cognizant of these conditions, and being so, was fully justified in taking any lawful steps in its power to protect the community, the people in it, and our local indus-

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tries, from the incursions of emigrant agents. These agents oftentimes are not prepared, and sometimes do not intend, to fulfill the promises which they make to those whom they persuade to leave their present employment and go elsewhere. The dictates of self-preservation as well as a proper regard for the welfare of unwary and easily led persons of the laboring class would suffice to impel the legislature to defensive action. Without recapitulating the various requirements of section 2 of Act 48 which are imposed as prerequisites to the obtaining of a license, we hold that they are reasonable requirements and within the discretion of the legislature to prescribe.

Counsel for the petitioner contend that this statute was "not intended as a police enactment for regulation, but was in reality passed for the purpose of preventing free egress of laborers out of the Territory." This contention cannot be sustained. The statute places no impediments upon the emigration of laborers. The conditions briefly referred to above, furnish, in our judgment, sufficient basis for the regulation of the business in question. Furthermore, granting that the business is one which may lawfully be taxed or regulated, the motive that prompted the legislature to act is beyond the reach of the courts. *McCray v. United States*, 195 U. S. 27, 54; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 340.

As to the point that the statute is in conflict with the interstate commerce clause of the Constitution. The case of *Williams v. Fears* effectually disposes of this contention. The Supreme Court there pointed out the distinction between interstate commerce and the mere incidents which may attend the carrying on of such commerce, and said, "The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce" (179 U. S. 278).

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As to the points that, for the reasons urged as above stated, the statute conflicts with the Fifth and Fourteenth Amendments of the Constitution. That there is sound ground for discriminating between the business of soliciting and hiring laborers to leave the Territory, and to work in the Territory, was pointed out in the case of *State v. Napier* where the court said, "Nor is the statute discriminating in any unlawful sense, by requiring a license for such business when the labor is to be performed out of the state, and not requiring a license when the labor is to be performed within the state. The business which seeks to induce laborers to leave the state and the business which promotes the employment of laborers within the state are so different in their tendencies for good or evil to general interests as to justify a different classification and treatment with respect to them" (41 S. E. 16). In *Williams v. Fears* the court said, "The point is chiefly rested on the ground that inasmuch as the business of hiring persons to labor within the State is not subjected to a like tax, the equal protection of the laws secured by the Fourteenth Amendment is thereby denied. * * * We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature" (179 U. S. 675, 676).

In *Louisville etc. R. Co. v. Melton*, 218 U. S. 36, 52, the court said, "As the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition." And in *Heath & Miligan Co. v. Worst*, 207 U. S. 338, 355, it was said that, "Legislation which regulates business may well make distinctions depend on the degrees of evil."

Section 1418c, of the Revised Laws provides that "Every person, firm or corporation conducting an employment or intelligence office or advertising as an employment or intelligence agent shall pay an annual license fee of twenty-five dollars." Petitioner's counsel assume that holders of licenses issued un-

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der that section "are legally authorized to carry on the same business as that defined under Sec. 1, of said Act 48," and then complain of the discrimination. If there is any warrant for the assumption one might have supposed that the petitioner would have obtained a license under that section. But it is obvious that the legislature did not regard the business of "emigrant agent" as being the same thing as that of an "employment or intelligence agent." The difference is that between the hiring of laborers to leave the Territory and the hiring of such to work within the Territory.

As above shown, the nature of the business of an emigrant agent, especially in view of the labor conditions as they exist in this Territory, clearly justifies proper regulation. We cannot say that any of the provisions of Act 48 following section 2 are unreasonable regulations or are otherwise invalid in so far as the objections which have been raised to them require to be considered and decided in this case. Liberty of contract is not universal, but must be understood to be subject to the exercise of the police power even though it may result occasionally in pecuniary injury to the persons affected. In *Gundling v. Chicago* the court said, "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference" (177 U. S. 188). See also *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Fischer v. St. Louis*, 194 U. S. 361; *McLean v. Arkansas*, 211 U. S. 539; *Williams*

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v. *Arkansas*, 217 U. S. 79; *Engel v. O'Malley*, 31 Sup. Ct. Rep. 190.

In considering the questions presented in connection with the Fourteenth Amendment we are not to be understood as deciding that the Amendment applies to the Territories. Doubt as to that was expressed by this court in *Robertson v. Pratt*, 13 Haw. 590, 598. In the case at bar the question has not been raised or discussed.

From the views herein expressed it results that the writ must be dismissed and the petitioner remanded into the custody of the respondent. An order to this effect will be made on presentation.

E. M. Watson and *R. W. Breckons* for the petitioner.

Kinney, Ballou, Prosser & Anderson and *J. W. Cathcart* for the respondent.

CONCURRING OPINION OF PERRY, J.

Of the respondent's contentions that as the petitioner does not claim to have paid or tendered the amount of the license fee required by section 2 of Act 48 he is not in a position to raise any question other than that of the validity of the single requirement as to the fee, and that in any event because the petitioner has not obtained a license under the statute he should not be allowed to raise any question as to the validity of any of the conditions or restrictions imposed by the statute upon licensees, as well as of his further contention that, even though the provision of section 2 requiring a bond should be held or assumed to be invalid, the remaining provisions of section 2 are valid and may stand by themselves, it is sufficient to say that it is unnecessary to pass upon them, for, assuming, in favor of the petitioner, that the provisions of section 2 are not severable and that neither the petitioner's failure to pay or tender the license fee nor his failure to obtain the license operates in the manner contended for by the respondent, nevertheless the conclusion of the court is that the warrant and complaint state

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a valid cause of imprisonment and that the petitioner must be remanded to the custody of the respondent. I do not, therefore, express or intimate an opinion concerning the merits of any of respondent's contentions just recited or of the point presented by petitioner by way of reply that section 2 requires a bond securing compliance in all respects with the subsequent provisions of the act, that the unconstitutionality of those provisions would not be available as a defense to an action on the bond (citing *Territory v. Tue Bun*, 20 Haw. 267), and that therefore he is now in a position to question the validity of all the provisions following section 2. Nor do I think that the mere exclusion of the evidence offered by the petitioner to prove that he held an emigrant agent's license under the act of 1905 requires or justifies any different method of disposition of the constitutional questions argued than would otherwise be accorded the petitioner. The ruling excluding the evidence was, in my opinion, correct. If the petitioner desired to avail himself of the alleged fact that he held a license, or of the defense that, holding a license under the earlier act, he was under no obligation to pay the fee prescribed by Act 48, he should have chosen some method of procedure, as, for example, a trial and an appeal, free from the limitations of habeas corpus. His position, and only possible position, upon this writ of habeas corpus is that, admitting it to be true as alleged in the warrant that he has no license, Act 48 does not validly require him to obtain one and that therefore he can do the acts charged without a license under that act. It is not as though he were endeavoring on mandamus to compel the issuance of a license and the treasurer were resisting on the ground that the license fee had not been paid. For the purposes of this case it is sufficient to assume that the petitioner's failure to obtain a license, under either law, does not of itself debar him of the right to present the objections of unconstitutionality which he has presented and then to hold, as we do, that all the objections which he is not

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for other reasons precluded from advancing are unfounded. See *Fischer v. St. Louis*, 194 U. S. 361, 372.

In all other respects I concur in the reasoning and conclusion of the majority.

JOHN W. WINKELBACH *v.* HONOLULU AMUSEMENT
COMPANY, LIMITED, AN HAWAIIAN CORPO-
RATION.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 8, 1911.

DECIDED MAY 16, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

~~CONTRACTS—employer—employee—partnership.~~

An agreement whereby H. A. Co. hires W. to conduct a popularity contest and as full compensation for his services W. is to have one-third of all moneys received from the sale of coupon tickets, does not constitute a partnership, but merely the relation of employer and employee.

OPINION OF THE COURT BY DE BOLT, J.

Plaintiff having filed his bill in equity praying for the appointment of a temporary receiver to take charge of the alleged partnership business involved in this suit and for an accounting concerning the same, moved for the appointment of such receiver and his motion having been denied, he was allowed an interlocutory appeal to this court.

The bill alleges, *inter alia*, that on March 16, 1911, plaintiff and defendant made and entered into an agreement in writing whereby, as plaintiff claims, they formed a partnership for the purpose of conducting a popularity contest in the theaters operated by defendant in Honolulu. The agreement referred to reads as follows:

“This agreement made between the Honolulu Amusement

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Company, Limited, first party, and John W. Winkelbach, second party, witnesseth:

"1. That in consideration of the mutual agreements herein-after contained, said first party agrees to hire said second party to conduct for it a popularity contest in the theaters operated by said first party in Honolulu, City and County of Honolulu, Territory of Hawaii.

"2. Said contest shall commence on the 17th day of March, 1911, and terminate on the 4th day of July, 1911, and be carried on in the name of said first party under the exclusive charge of said second party, subject to the control and direction of said first party.

"3. The person receiving the highest number of votes shall receive as a prize a new automobile of the approximate value in Honolulu of Fifteen Hundred Dollars, which shall be furnished by said first party at its own expense.

"4. The accounts relating to the sale of coupon tickets shall be settled once each day, and said second party shall upon such settlement immediately pay all moneys shown to be due thereby to said first party.

"5. Said first party shall advertise said contest in the newspapers in Honolulu with its regular advertisements of its theaters, without charge to said second party; furnish at its own expense tickets with coupons attached, which coupons are to be used for voting for the contestants; honor all such tickets presented for performances in any of its theaters in Honolulu, within such time limit as it shall designate, for which it shall have received full payment in cash; and at its option, upon due notice to the public, shall have the right to reserve certain nights, not to exceed one night in each week, when coupon tickets shall not be received for any of its performances.

"6. Said second party shall organize, equip and carry on at his own expense, except as otherwise herein provided, said contest; use his best endeavors to secure contestants to come to in said contest; obtain such prizes as may be agreed upon; canvass for donation of prizes in return for publicity; secure the highest bids obtainable for performances to contestants; keep in constant touch with contestants through himself or his agents, and advise them as to the ways to obtain votes; secure persons satisfactory to said first party to act as judges in such contest; procure and hire at his own expense, such agents and help as in his

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judgment shall be necessary to successfully promote said enterprise; and in every way possible endeavor to obtain the best results for said contest.

"7. Said second party shall receive as full compensation for the promoting and carrying on of said contest one-third of all moneys received by him or his agents or from the contestants in said contest, or arising from the sale of coupon tickets, or sale of performances upon bids secured by him as aforesaid; but he shall not receive any part of the money for tickets sold at the box offices (other than on coupon tickets which said first party may sell at his election at the box offices), nor any money received by said first party in the regular course of its business.

"8. Said second party shall on or before the 15th day of April, 1911, deposit with the first party the sum of Five Hundred Dollars, to be held by it for the faithful accounting and payment to said first party of all moneys received by said second party, his agents or employees in the premises, to be repaid to said second party upon final settlement with him under this contract.

"9. In case said second party shall violate any of the terms of this agreement on his part to be observed or performed, said first party shall have the right to terminate this agreement upon written notice delivered to him personally, or deposited in the Post Office addressed to him in Honolulu or to his last known Post Office address, and thereupon all interest of said second party under this agreement shall cease, and said one-third of the moneys theretofore received by him shall be full compensation to him for all services rendered and expenses incurred in the matter of said contest.

"10. In case of the death of said second party, this contract may be carried on to completion by his personal representatives, or such person or persons as he may in writing appoint, who shall receive such compensation as said second party would have been entitled to if living."

Other allegations contained in the bill need not be stated, as the question of partnership is the only one, in the view we take of the case, that will be discussed in this opinion. Plaintiff admits that if the agreement does not constitute a partnership his suit cannot be maintained.

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The question for consideration being confined to the agreement itself, we shall seek to ascertain therefrom the legal intention of the parties; the existence or nonexistence of the partnership being necessarily, a legal deduction to be drawn from the agreement before us.

Respecting the essential elements and tests of partnership, as regards liability between the parties themselves, we cite the following authorities:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." *Meehan v. Valentine*, 145 U. S. 611, 618.

"Partnership is a contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss, in certain proportions." 3 Kent Comm. *24.

"Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." *Parsons on Partnership* (4th ed.), §1.

"Partnership is the relation subsisting between two or more persons who have contracted together to share, as common owners, the profits of a business carried on by all or any of them on behalf of all of them." *Shumaker on Partnership*, p. 2.

"Partnership is the relation existing between persons who have so contracted that the profits of some business enterprise conducted by any or all of them for them all enure to all as co-owners, and are shared accordingly." *George on Partnership*, §1.

See also, 30 Cyc. 349; 22 Am. & Eng. Ency. Law (2d ed.), 13 et seq.; *Woolworth v. McPherson*, 55 Fed. 558; *Omaha & Grant Smelting & Refining Co. v. Rucker*, 40 Pac. (Colo.) 853; *Price v. Middleton & Ravenel*, 55 S. E. (S. C.) 156; *Ryder v. Wilcox*, 103 Mass. 24; *Hawes v. Tillinghast*, 1 Gray 289; *Shea v. Nilima*, 133 Fed. 209; 1 Lindley on Partnership, 1 et seq.; *Salter v. Ham*, 31 N. Y. 321; *Story on Partnership*, §15 et seq.; *Barnes v. Collins*, 16 Haw. 340.

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It is apparent from the foregoing definitions and authorities that two essential elements are present and indispensable in every partnership. These are, first, a contract between the parties; and, second, this contract must be for the sharing as common owners of the profits of a lawful business. While it is true, the instrument which we are considering is a contract, it is not a contract constituting a partnership. The essential elements mentioned by the authorities are lacking. The relation of plaintiff and defendant, as evidenced by the agreement, is contractual only. The contract of partnership is something more than an ordinary contract. It creates, in addition to the contractual relation, a status. It brings into existence, in a limited degree, a legal entity, the members of which are co-principals and who are, in contemplation of law, clothed with the power of mutual agency, whereby, within well defined limits, each member may act for all and in the name of the legal entity—the partnership. This agency results from and is inherently incident to the partnership. It need not be expressly authorized or mentioned. In the case at bar, however, as in all such cases, the agency, or power to act on the part of the plaintiff, was expressly created by the agreement, and did not result from any status or entity whatsoever. The agreement is an ordinary contract, whereby the defendant, “said first party, agrees to hire” the plaintiff, “said second party, to conduct for it a popularity contest in the theaters operated by said first party in Honolulu,” and “said second party shall receive as full compensation for the promoting and carrying on of said contest, one-third of all moneys received by him or his agents;” that is to say, the gross returns were to be divided between them, one-third to the plaintiff as compensation for his services and two-thirds to the defendant as proprietor and employer, each to pay his own expenses, except that the defendant was to advertise the contest. The agreement is wholly destitute of the usual and ordinary words and expressions, such as “partnership,” “partner,” “profits,” etc., commonly employed in partnership agree-

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ments; and the language used fails to disclose, or even to intimate, any community of interest, or co-ownership, or sharing of profits, tending to show the relationship of partners. There is absolutely no element of profit sharing, or community of interest, or co-ownership contemplated in the money to be received under the agreement. The language employed simply shows a mere hiring by the defendant of the plaintiff to perform certain services for a specified compensation, thereby creating the relation of employer and employe, principal and agent. The expressions used are also wholly inconsistent with the idea of partnership. It is clear that the parties by their agreement did not intend or contemplate the sharing of any profits in the capacity of co-principals which is essential to a partnership. 30 Cyc. 371. But it is clear that they agreed to share the gross returns, which is not even *prima facie* evidence of partnership. 22 Am. & Eng. Ency. Law (2d ed.) 44. While profit sharing is not a conclusive test of partnership, it is, however, an important consideration tending to prove partnership; for an agreement to share profits is an essential element of every true partnership, and though its presence is not conclusive that a partnership exists, its absence is conclusive that a partnership does not exist. 30 Cyc. 369; 22 Am. and Eng. Ency. Law (2d ed.) 22, 23.

The plaintiff places considerable stress upon paragraph 10 of the agreement, which provides that in case of his death the agreement might be carried on to completion by his personal representatives, or by such person or persons as he should appoint. We see nothing in this provision tending to show that the parties intended to form a partnership. Such provisions, it is true, are sometimes incorporated in articles of partnership, but they may also be made a part of contracts for personal services. In the absence of express provision to that effect, neither a stranger nor the representatives of a deceased partner, or of a party to a contract for personal services, may of right perform the contract or enjoy its rights as a substitute for the de-

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ceased. Contracts of partnership, as well as contracts for personal services, are entered into by reason of the particular confidence each partner or party has in the fitness and capacity of the other. But there is no reason why the parties may not provide, in the event of death, for carrying out any contract for personal services, as well as that of partnership, by their representatives or other persons. Bishop on Contracts, §861; Clark on Contracts, p. 523.

The ruling of the circuit judge in denying the motion for the appointment of a receiver is, therefore, affirmed and the cause is remanded to the circuit judge for such further proceedings as may be necessary and proper.

Lorain Andrews (Eugene Murphy with him on the brief) for plaintiff.

J. A. Magoon (Magoon & Weaver on the brief) for defendant.

ANDREW I. BRIGHT v. THOMAS J. QUINN.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 4, 5, 1911.

DECIDED MAY 18, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*diagram of place of accident.*

A diagram exhibited to a witness for the purpose of illustrating a question need not be prepared by an expert surveyor.

NEGLECT—*contributory negligence—standing on running board of street car.*

In an action against a person operating an automobile to recover damages for negligence causing injury to the plaintiff, the fact that the plaintiff while a passenger on a street car remained on the running board does not necessarily constitute negligence, irrespective of whether there were vacant seats in the car. Whether or not the plaintiff was guilty of contributory negligence is a question to be determined by the jury in view of all the circumstances of the case.

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TRIAL—argument of counsel—comments on conduct of party and of witnesses.

Comment before a jury on the fact, disclosed by the evidence, that one of the parties paid for the lunches of two witnesses on two days during the trial is within the bounds of legitimate argument.

TRIAL—instructions—form and arrangement.

Instructions need not be given in the precise words requested if they are substantially given in another form.

DAMAGES—punitive—when recoverable.

Punitive damages are recoverable in actions of tort when the defendant's misconduct has been wilful or when he has acted with a reckless indifference to the rights of others.

OPINION OF THE COURT BY PERRY, J.

In this case the plaintiff claims the sum of five thousand dollars as damages for injuries suffered by him in consequence of the alleged negligence of the defendant while operating an automobile on Hotel Street in this city on October 21, 1909. The plaintiff at the time of the accident was standing on the running board of an electric street-car and was thrown to the ground by the impact of the automobile which was going in the opposite direction. The jury returned a verdict for the plaintiff for one thousand dollars. The case comes to this court on twelve exceptions, the first of which has been abandoned.

Exception 2. A witness for the plaintiff having failed to understand a question concerning the position of the automobile with relation to the street-car, the railroad track and the side lines of the street, counsel drew a diagram showing roughly the lines of the street and the position of the track and then showed it to the witness while repeating the question. The question was objected to "as leading and misleading, the description being used is not a map, has not been put in evidence, calls the attention of the witness to something which does not go on the record, which is not presented here as an accurate drawing." Without repeating in full the question, as asked, we are unable to sustain the objection on any of the grounds stated. A diagram exhibited to a witness for the purpose of illustrating a question

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need not be prepared by an expert surveyor. The drawing bears the clerk's endorsement to the effect that it was received in evidence and was before the jury for consideration in connection with the witness' answer.

Exception 3. E. E. Bodge, a witness for plaintiff, testified that he was in the business of repairing and selling automobiles, that he was familiar with the machine operated by defendant at the time of the accident and also with one operated by a certain Hughes, that both were of the same general character, that in their dimensions there was "very little difference, might be a matter of an inch or two one way or the other" in width, described experiments made about a year after the date of the accident under a tamarind tree overhanging the roadway at or near the place of the accident and concerning which testimony was given by other witnesses, and was then asked, "What clear way was there between the tip of the top of that canopy" (of the Hughes' car) "to the nearest branch of that tamarind tree?" To this question the defendant objected on the ground that there was no evidence tending to show whether the condition of the tree was the same at the time of the experiment as at the time of the accident. Perhaps it was error to permit the question under the circumstances, but it was not of such consequence as to require the setting aside of the verdict. Moreover, the defendant subsequently gave testimony to the effect that between the date of the accident and of the experiments by Bodge the lower branch, or a part of it, of the tree had been cut. No witness testified to the contrary and the defendant had the benefit of that testimony in attacking, if he did, Bodge's evidence.

Exception 4a. Objection was also made to testimony by Bodge concerning measurements which he made of the distance between the Hughes' car and the railroad track, on the ground, apparently, that the automobile used for the purpose of the measurements was not that of the defendant. In view of

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the evidence of the great similarity between the two machines the objection is unfounded.

Exceptions 4b and 6. Bodge was asked on cross-examination, "What would you consider to be a safe distance to run from the bough of that tree?" and the defendant on direct examination, "What is the proper distance or space to allow your machine in passing under a tree, under the tree there that night, at any time?" and the questions were disallowed. The rulings were correct. The questions in effect called for the opinion of the witness upon the ultimate issue of negligence. It was for the jury to say, under all the circumstances as they found them to exist on the evening in question, whether the defendant acted as a reasonably careful and prudent man in not causing his automobile to pass closer to the tree or in bringing it as close to the street-car as he did.

Exceptions 5 and 9. The defendant moved for a nonsuit "on the ground of the contributory negligence of the plaintiff in standing on the running board of the car in which there was room for him to ride inside, therefore, according to the affirmative showing of the plaintiff, he is guilty of contributory negligence and cannot recover" and requested an instruction directing a verdict for the defendant on the ground that "the evidence in this case has established the fact that plaintiff was guilty of contributory negligence at the time of the injury." Exceptions were noted to the refusal of the motion and of the request and also to the verdict on the ground that it was contrary to the law and the evidence. The plaintiff testified that as he approached the car with the purpose of boarding it, and also after stepping on the lower running board, he looked over the car and was able to see no vacant seat, that he remained on the running board at a point opposite the second seat from the front end of the car and stood there facing forward until called upon by the conductor for his fare, that immediately after paying his fare he turned forward and then saw for the first time the lights of the approaching automobile dangerously close to

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him, that he hastily stepped upon the second or higher running board in an effort to escape the advancing automobile and that at about the same time some portion of the automobile struck him and forced him to the ground. The evidence was conflicting as to whether or not, in fact, any of the seats in the car were vacant while the plaintiff was a passenger, and it is impossible to ascertain from the record what the finding of the jury was on this point. But whether all of the seats were occupied or a few of them were vacant, it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence merely by reason of the fact that he remained upon the running board. It is a matter of common notoriety in this city that men often ride upon the running boards of the cars of the Honolulu Rapid Transit & Land Company irrespective of whether or not the seats are all occupied. This is known as well to drivers of automobiles and other vehicles who make use of the public highways as to other members of the community, and every person who operates an automobile in this city should operate it with that fact in view. In each case it is for the jury to determine, in view of the passenger's physical condition, of the existence or nonexistence of possible obstructions of the roadway and of all other circumstances, whether the passenger in remaining on the running board acted as a reasonably careful and prudent man similarly situated would have acted. In this case it would not have been unreasonable for the jury to find that men of ordinary care and prudence would have so ridden under the circumstances as they existed,—in other words, a finding that the plaintiff was free from negligence would not be contrary to the evidence.

The case of *Fuller v. Rapid Transit Co.*, 16 Haw. 1, does not decide to the contrary. That was an action against the street railway company upon one of whose cars the plaintiff was a passenger at the time. The plaintiff had stepped upon the running board of the car, had paid his fare and was walking forward upon the standing board "to see if he could find room to sit

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down in the car," and the ruling was that, as a matter of law, it could not be said that the plaintiff was guilty of contributory negligence "in getting upon the car at the side or in walking along the outside stepping board to find a seat, the car appearing to be full. The stepping board is intended to be used for that purpose and that it is so used by the public is a matter of common notoriety." On the general subject under discussion see *Connolly v. Ice Co.*, 114 N. Y. 104.

The question as to what the rule would be in an action brought by a passenger against a street railway company, whether the seats were all occupied or partly unoccupied, is not involved in this case. Our consideration is confined to the facts before us.

Exception 7. In the course of his argument to the jury counsel for the plaintiff said that the conduct of the defendant in paying for the lunches of Howks and Bly, witnesses for the defendant, was "in very bad taste, to say the least," and "the same as if he had taken you gentlemen of the jury to lunch with him." Counsel for the defendant interrupted the argument at this point and requested the court to instruct the jury "that there was nothing improper in a party to a cause paying for the lunches of a witness." This the court refused to do. The ruling was correct. There was evidence to the effect that the defendant had furnished lunch to the witnesses named on two days while the trial was in progress. Whether or not and to what extent the witnesses were influenced by the fact referred to was for the jury to say. It was within the bounds of legitimate argument for the attorney to call the attention of the jury to the facts as disclosed by the evidence and to suggest his own views on the subject.

Exception 8. The presiding judge refused all of the instructions asked by the parties and gave to the jury instructions prepared by himself. The defendant complains that his instructions were not given in the very words requested. In this jurisdiction it is settled beyond doubt that instructions need not be given in the precise words requested, if they are substantially given in another form. *The King v. Cornwell*, 3 Haw. 154; *Merrill v.*

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Jaeger, 5 Haw. 475, 483, 484; *The King v. Ahop*, 7 Haw. 556, 563; *Provisional Government v. Gertz*, 9 Haw. 288, 292; *Schmidt v. Royal Ins. Co.*, 10 Haw. 683, 687; *Laupahoehoe Sugar Co. v. Wilder S. S. Co.*, 11 Haw. 261, 270; *Kapiolani Est. v. Cleghorn*, 14 Haw. 330, 338.

Exception 10 is "to the refusal of the court to give all the instructions of the defendant which were not included in its charge, and to each and every one thereof." The only matter argued under this exception is the refusal of defendant's requested instruction No. 14, reading, "If you find from the evidence that at the time of the alleged injury the plaintiff was standing on the running board of the electric car and that his body, or part of his body, was projecting beyond the body of the electric car, then the plaintiff is guilty of contributory negligence and you must find for the defendant." This is sufficiently disposed of by what has been said concerning exceptions 5 and 9. The mere fact that the plaintiff's body projected, in part, if it did, beyond the extreme limits of the car, would not necessarily, and as a matter of law, render him guilty of contributory negligence or bar him from recovering.

Exception 11 is to the verdict "as being contrary to the law and the evidence and to the weight of evidence." The only point made under this exception is that the verdict is excessive and that punitive damages are not recoverable in any action of tort such as this, and at least were not recoverable under the circumstances of this case. The presiding judge instructed the jury: "if you find from the evidence that the injury to the plaintiff occurred through the wilful and wanton disregard by defendant of the rights of others, you are not confined to mere compensation to plaintiff for his injuries, but may, under such circumstances, award punitive or exemplary damages." The defendant noted an exception to the charge "as a whole" but did not except specifically to the instruction just quoted or request the giving of one to the contrary. Whether under the circumstances he is in a position, under the exception to the verdict, to urge his present

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contention that punitive damages are not recoverable is far from clear. See *Territory v. Lau Chong*, ante 235, and *Makekau v. Kane*, ante 203. However that may be, the point, even though properly before us, cannot be sustained.

There was evidence sufficient to support a finding that the plaintiff was rendered unconscious by the fall and remained at the hospital for eight days receiving treatment, that he received an injury on the head leaving a scar two inches long, that a part of one of his ears was almost severed from the remainder of that organ, that he received other bruises about the head and arms, that he suffered intense pain for days, that his jaws were injured so as to render mastication exceedingly difficult and that he did not recover their full use for a period of about five months, that during the whole of that period he suffered some pain and was unable to do his accustomed work and that prior to the accident he had been a ship carpenter and caulker earning at times as much as \$5 per day and subsequent to the injury received employment in clerical capacities, first at \$135 for twenty-seven or twenty-eight days and later at \$80 a month plus certain "side-money tips." Even if it were apparent from the record that the jury awarded compensatory damages only it would be impossible to say that the verdict was excessive. An award of \$1000 as compensation for the injuries and pain testified to as having been suffered by the plaintiff would not be unreasonable. However that may be, the jury were instructed that if they should find from the evidence that the injury occurred "through the wilful and wanton disregard by defendant of the rights of others" they would not be confined to more compensation but could award punitive damages. While the propriety of the doctrine has been questioned it is now too well established to admit of argument that in actions of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. *Bernard v. Loo Ngawk*, 6 Haw. 214; *Ayers v. Mahuka*, 9 Haw.

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377; *Day v. Woodworth*, 13 How. 363, 371; *R. R. Co. v. Quigley*, 21 How. 202, 214; *R. R. Co. v. Arms*, 91 U. S. 489, 492, 493; *Ry. Co. v. Prentice*, 147 U. S. 101, 107; *Scott v. Donald*, 165 U. S. 58, 86, 88. Such damages may be awarded in cases where the defendant "has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations" (*Ry. Co. v. Prentice*, supra); or where there has been "some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences" (*Ry. Co. v. Arms*, supra). In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them. *Ib.* Measured by these standards, there was sufficient evidence in the case to justify the jury in awarding punitive damages. A finding that the defendant operated his automobile on the occasion in question with a reckless indifference to the rights of the plaintiff or of any others who might be on the street-car would have been supported by evidence. It is true that the defendant's explanation, given on the witness stand, was that starting from a point adjoining the mauka sidewalk on Hotel Street his automobile had not crossed to the makai side of the railway track, was still proceeding at intermediate gear and consequently had not yet gathered much headway when the car appeared suddenly at a curve in the road at a point very near to the defendant and that at the moment it seemed to the defendant that under the circumstances the safest course to pursue would be to endeavor to pass the street-car on its mauka side and that the accident was purely the result of an error of judgment. The jury, however, seems to have placed no credence on this statement and to have believed the evidence to the contrary, which was, in substance, that the automobile was proceeding eastward on the makai side of the railway track when first seen by those in the street-car and was at that time about 150 feet distant, that there were no vehicles or other obstructions of any kind to prevent his continuing on the makai side of the

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street and thus passing the street-car, that when within twenty-five or thirty feet of the street-car he suddenly, without sounding his horn, turned the automobile to the upper side of the street in front of the car, that the car, which had shortly before stopped at one of its stations, was proceeding at a very moderate rate of speed and stopped within one and one-half or two lengths of the place where the plaintiff fell to the ground, that all the lights on the street-car were burning as usual, that in the collision the stanchions of the defendant's automobile were splintered and the right front fender bent and one of the handle bars of the street-car broken, that the collision was accompanied by a crash which was plainly audible to those on the street-car and that the defendant continued on his way in his automobile without stopping to render assistance or make any inquiries. Upon this state of the evidence, an award of punitive damages, if any was made, cannot be set aside.

The exceptions are overruled.

F. Schnack (*E. C. Peters* on the brief) for plaintiff.

J. A. Magoon and *C. K. Quinn* (*Magoon & Weaver* on the brief) for defendant.

JAMES CORNWELL, MARY KALEINOEHU CRAWFORD AND KAMAI KONA v. WAILUKU SUGAR COMPANY, A CORPORATION.

MOTION TO QUASH WRIT OF ERROR.

ARGUED MAY 15, 1911.

DECIDED MAY 20, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*waiver of right to writ of error—payment of costs.*

The mere payment of the costs by an unsuccessful plaintiff in an action of trespass is not a waiver of the right to prosecute a writ of error from the judgment entered on the merits.

Cornwell v. Wailuku Sugar Co., 20 Haw. 513.

OPINION OF THE COURT BY PERRY, J.

The defendant moves to dismiss the writ of error sued out by the plaintiff on the grounds (1) "that it appears affirmatively from the petition on file that this court was without jurisdiction to grant the writ of error prayed for" and (2) "that prior to the issuance of such writ of error execution on the judgment heretofore entered in the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii in favor of the defendant and against the plaintiff had been returned fully satisfied." The petition for the writ was first filed and the writ issued on April 22, 1911. The petition in its original form recited that the verdict was rendered on October 21, 1910, that judgment was "thereafter and thereupon entered in accordance with the said verdict" and that six months had not elapsed "since the said verdict was so rendered." By consent of the appellee the word "judgment" was substituted for "verdict" in the sentence last quoted. In the amended form there is nothing in the petition to contradict or render ambiguous the allegation that six months have not elapsed since the judgment was entered. The first ground of the motion, therefore, cannot be sustained.

The original action was one of trespass and the judgment, following the verdict, was that the plaintiffs take nothing and that the defendant have judgment for its costs taxed at \$33. From an affidavit filed in support of the motion it appears that on or about December 10, 1910, execution was issued against the property of the plaintiffs and returned "fully satisfied." The satisfaction admittedly consisted merely in the payment of the costs. Section 1869 of the Revised Laws provides that a writ of error may be had "at any time before execution thereon is fully satisfied." In *Peabody v. Damon*, 15 Haw. 628, 629, 630, an action to quiet title wherein judgment was for the defendants and execution was taken out and satisfied for the costs, a motion to quash the writ on the ground that the execution had been fully satisfied was presented. Concerning the

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motion the court said: "The contention that the plaintiff was precluded from suing out this writ on the ground that execution was fully satisfied, cannot be sustained. It is true that a writ of error may be had only before execution is fully satisfied (C. L., Sec. 1443), and that no reversal on error can affect the validity of a sale on execution prior to the service of the assignment of error (Id., Sec. 1455), but has execution been fully satisfied within the meaning of the statute? Perhaps so as to costs, but not as to the title to the land. Assuming that the defendants were in possession, as they probably were, and that the execution for the costs was the only execution that could be issued, still as a matter of fact no execution has been issued or satisfied in respect to the title to the land, which was the subject of the suit, the costs being a mere incident, and a plaintiff would not be precluded from obtaining a writ to correct errors in a judgment merely because execution for costs was satisfied any more than he would be precluded if there had been no costs and therefore could be no execution for them. Apart from the statute, the payment of costs cannot under the circumstances operate as a voluntary waiver of the right to a writ of error. See *State v. Martland*, 71 Ia. 543."

The ruling thus made is applicable to the case at bar. The fact in this case is, as it was assumed to be in that, that the execution for costs was the only execution that could be issued, and yet, repeating the language used in that case, as a matter of fact no execution has been issued or satisfied in respect of the principal subject of the action, the right to damages for the injury to the land. In this instance, as in that, the costs were merely incidental. Their payment cannot operate as a waiver of the right to a writ of error.

The motion is denied.

J. Lightfoot for plaintiff.

M. F. Prosser for defendant.

Kaehu v. Namealoha, 20 Haw. 516.

ANE KAEHU v. MEEAU NAMEALOA.

MOTION TO QUASH WRIT OF ERROR.

ARGUED MAY 15, 1911.

DECIDED MAY 20, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*error to decision in jury-waived case.*

A writ of error does not lie to a decision of a circuit court in a case tried without a jury where final judgment has not been entered in the case.

OPINION OF THE COURT BY ROBERTSON, C.J.

The defendant moves to quash the writ of error issued in this case to the circuit court of the second circuit "for the reason that no final judgment has been entered in the above entitled cause."

The action, which was one of ejectment, was tried in the court below jury waived. At the conclusion of the trial the judge took the case under advisement and on October 17, 1910, rendered and filed a decision holding that the plaintiff and defendant were tenants in common and that the plaintiff was not entitled to recover. Thereafter plaintiff's counsel submitted a form of judgment which he asked the court to order to be entered. The court declined to do that on the ground "that on the 17th day of October, A. D. 1910 the Judge of this Court rendered final judgment in this cause, which final judgment was immediately filed and was entered in the judgment book." The decision referred to was designated in the caption, "Decision," and it bears none of the ear-marks of a technical judgment. It cannot properly be regarded as a judgment.

The statute provides that in actions of law tried to the court without a jury "the court shall hear and decide the cause, both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor." R. L. Sec. 1747, as amended by Act 117, Laws of 1909. In *Kapepee v. Kupahi*,

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16 Haw. 799, it was held that the decision and the judgment might be incorporated together, when signed by both the judge and the clerk. Good practice, however, would require that the judge should render his written decision and that the clerk should thereupon enter a judgment pursuant to that decision in accordance with R. L. Sec. 1804, as amended by Act 83, Laws of 1907. In this case the circuit judge should have caused the judgment to be entered as asked for by the plaintiff.

The question presented for determination is whether a writ of error will lie to a decision of a circuit court in a jury-waived case where no formal judgment has been entered by the clerk.

Section 1869 of the Revised Laws authorizes a writ of error to review the decision of any court except the supreme court. Section 1870 provides that "writs of error shall lie to any decision or ruling by a judge in any case in which jury has been waived." The word "judge" in that section must be construed as meaning "court," as the decision in a jury-waived case is that of the court and not of the judge. *Ahin v. Widemann*, 7 Haw. 333. We think, therefore, that Section 1870 adds nothing to Section 1869, under the provisions of which the writ lies to review decisions of circuit courts in jury-waived cases. The legislature enacted Section 1870 possibly out of abundant caution in view of the ruling made in *Ahin v. Widemann*, that, under statute then in force, a writ of error did not lie to the judgment in a jury-waived case.

Section 1869 contemplates the entry of a judgment. The term "writ of error" must be taken in its common law acceptation, and is to be understood as being a proceeding aimed at final judgment in a case in which error is claimed to have been committed, for the purpose of bringing up the record in order that the error may be rectified. "On error the final judgment alone is brought up, the specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts

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and law warrant as shown by the entire case." *Territory v. Cotton Bros.*, 17 Haw. 374, 381.

Final judgment must, therefore, have been entered in the cause. The word "rendition" as used in Section 1869 is to be construed as meaning the "entry" of the judgment. *Cummings v. Luakea*, 10 Haw. 1, 3; *Tibbets v. Pali*, 15 Haw. 137; *Cornwell v. Wailuku Sugar Company*, ante, p. 513.

Upon the entry of the judgment in the original case the plaintiff may, if she be so advised, have her writ of error.

The motion to quash the writ of error must be granted. The writ is, accordingly, quashed.

Douthitt & Coke for the motion.

T. M. Harrison contra.

IN THE MATTER OF THE APPEAL OF J. A. CUMMINS FROM A RULING OF THE AUDITOR OF THE TERRITORY OF HAWAII.

ARGUED MAY 26 AND JUNE 2, 1911.

DECIDED JUNE 15, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CONSTITUTIONAL LAW—*invalidity of statute as a defense by ministerial officer.*

The auditor of this Territory may invoke the invalidity of a statute in defense of his action in refusing to allow a claim.

TERRITORIES—*limitations on legislative power of.*

An appropriation of money by the legislature to refund the amount of a fine paid pursuant to a judgment of a court of competent jurisdiction upon the assumption that the accused was innocent is an illegal attempt to exercise judicial functions. (Per Robertson, C.J.)

SAME—*use of public funds for private purposes.*

It is beyond the power of the legislature to authorize the expenditure of money raised by taxation by way of gift or gratuity to individuals in the absence of, at least, a moral obligation to support the appropriation. (Per Robertson, C.J.)

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SAME—existence of moral obligation to justify expenditure ultimately a question of law.

The courts are not always concluded by a legislative opinion or finding that a moral obligation existed to support an appropriation of public money for a private purpose. (Per Robertson, C.J.)

SAME—rightful subject of legislation.

Act 144 of the Session Laws of 1911, held to constitute an invasion of the judicial power, and an illegal attempt to divert public funds to private use, and hence, not a rightful subject of legislation within the meaning of section 55 of the Organic Act. (Per Robertson, C.J.)

PARDON—power in governor, not in legislature.

The power of pardon is by section 66 of the Organic Act vested in the governor exclusively and can not lawfully be exercised by the legislature. Under this power the governor may grant pardons which are partial in their operation as well as those which are full and absolute. The legislature may not remit a fine judicically imposed. (Per Perry, J.)

Id.—statute remitting fine invalid.

An appropriation was made by the legislature of a sum of money "for the purpose of refunding" to a person duly convicted and sentenced by a judicial tribunal "the fine" imposed under the sentence and paid by the accused. As to the fine the executive had refused or at least failed to grant a pardon. The appropriation was not within the legislative power and is invalid. (Per Perry, J.)

This is an appeal from a ruling made by the territorial auditor by which he refused to issue a warrant upon the treasurer on the claim of John A. Cummins for the sum of five thousand dollars. This sum, the appellant claims is due and payable to him pursuant to Act 144 of the Session Laws of 1911, which is here set forth in full.

"An Act for the Relief of John A. Cummins.

"Whereas, it appears that John A. Cummins, a descendant of one of the High Chief families of Hawaii, and a man who has occupied honorable positions under the late Hawaiian Monarchy, was arrested on the 16th day of January, A. D. 1895, and charged before a Military Commission with the crime of Treason; and

"Whereas, it further appears that owing to inadvertence

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and a non-comprehension of the gravity of the plea, he plead guilty to the said charge of Treason; and

"Whereas, the seven judges presiding at the Military Commission before which he was charged, although recognizing the fact that he was not guilty of the crime of Treason, were powerless under the law to do other than impose a sentence of 'five years hard labor and a monetary fine of Five Thousand Dollars;' and

"Whereas, the reviewing authorities, acting on the recommendation of the said Military Commission, did mitigate and modify the said sentence by striking out the 'five years hard labor,' but retaining the said monetary fine of Five Thousand Dollars, which sum the said John A. Cummins was compelled to borrow at a high rate of interest in order to pay the said fine and thereby obtain his liberty; now, therefore,

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The sum of Five Thousand Dollars (\$5,000.00) is hereby appropriated to be paid out of any moneys in the Treasury of the Territory of Hawaii not otherwise appropriated, for the purpose of refunding to said John A. Cummins the fine hereinabove set forth.

"Section 2. This Act shall take effect from and after the date of its approval.

"The Senate of the Territory of Hawaii,

"Honolulu, T. H., April 25, 1911.

"We hereby certify that the foregoing Bill, after reconsideration on the veto of the Governor, was, upon a vote taken by Ayes and Noes, approved by a two-thirds vote of all of the elective members of the Senate of the Territory of Hawaii, this day.

"Eric A. Knudsen,

"President of the Senate.

"John H. Wise,

"Clerk of the Senate.

"The House of Representatives of the Territory of Hawaii,

"Honolulu, T. H., April 26, 1911.

"We hereby certify that the foregoing Bill, after reconsideration on the veto of the Governor, was, upon a vote taken by Ayes and Noes, approved by a two-thirds vote of all of the

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elective members of the House of Representatives of the Territory of Hawaii, this day.

“H. L. Holstein,
“Speaker, House of Representatives.
“Edward Woodward,
“Clerk, House of Representatives.”

The appellant is one of those persons who were prosecuted before a military commission in 1895 for complicity in the attempt which was made in January of that year to subvert the then existing government of these Islands and to restore the monarchy. Upon his plea of guilty to a charge of treason the appellant was sentenced to a term of five years at hard labor and to pay a fine of five thousand dollars. The sentence was modified by President Dole of the Republic of Hawaii, as commander-in-chief of the military forces, by eliminating the term of imprisonment. The fine of five thousand dollars was then paid. Thereafter, on or about the 18th day of July 1898, President Dole granted the appellant, as well as many others who had been convicted before the military commission, a full and free pardon and restoration to his civil rights.

In refusing the appellant's demand the auditor stated that he was advised and believed that the act in question was unconstitutional and void “because, among other reasons, it authorizes the use of public moneys for private purposes.”

In his message to the legislature vetoing the bill, on April 24, 1911, the governor said, “The object of this bill is to pay to John A. Cummins the amount of a fine of \$5,000 which he paid sixteen years ago under a sentence based on a plea of guilty.

“There is much in this case to appeal to sentiment and sympathy, and for that reason it is both difficult and unpleasant to consider the bill upon its merits. It is unfortunate that this matter, recalling, as it does, the circumstances out of which this case arose, should be reopened. Looking at the matter from the standpoint of broad policy, the repayment of the fine in question would tend to serve as an embarrassing precedent

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in other cases that might appeal to sentiment, and especially in the other cases which arose out of the same circumstances. Mr. Cummins was the only one out of about one hundred and ninety who escaped imprisonment by paying a fine. A recognition of this claim might well be regarded as a recognition of the claims of the others, and there would be as much logic in compensating the others for their several periods of imprisonment as in compensating him for the fine which he paid.

"Be that as it may, there seems to be an insuperable legal objection to this bill. The fine when paid became public money. That particular money was expended long ago by the Republic of Hawaii, but, whether it was or not and even if it had been paid to the Territory of Hawaii, its payment to a private individual, or the payment of a like sum out of other public moneys, would come within the constitutional inhibition against the use of public moneys for private purposes. A bill of this kind is not an exercise of the pardoning power, for that is vested solely in the executive, and even the executive could not exercise that power in such a way as to remit a fine already paid under a legal judgment. This case is not one of those in which a legislative body may authorize the repayment of moneys under a mistake of fact or even moneys paid under a mistake of law. In such cases the question is merely one of policy. The money is the peoples', for the peoples', that is, for public purposes and cannot lawfully be diverted to private purposes."

ROBERTSON, C.J. The first point to be considered is that raised by the appellant to the effect that the auditor, having no personal interest in the money involved in this case, may not raise the question as to the validity of the statute because "the court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who, therefore, has no interest in defeating it." The principle referred to has been applied by this court in several cases. In the case at bar no constitutional question, strictly speaking, is raised. The contention of the attorney general is that the

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statute is not a "rightful subject of legislation" within the terms of the grant of legislative power contained in section 55 of the Organic Act.

Assuming, however, that there is sufficient analogy to warrant the application of the principle the contention will be considered on the basis upon which it is founded.

The question whether a public officer may set up the unconstitutionality of a statute in defense of his refusal to perform an alleged ministerial duty has frequently arisen in mandamus proceedings, and, as pointed out in 19 Am. & Eng. Enc. Law (2nd ed), 764, the cases are in irreconcilable conflict. In *Smith v. Indiana*, 191 U. S. 138, 148, the court said, "We have no doubt of the power of the state courts to assume jurisdiction of the case if they choose to do so, although there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution. It is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it has often been assumed, and sometimes directly decided, to exist. In any event it is a purely local question, and seems to have been so treated by this court in *Huntington v. Worthen*, 120 U. S. 97, 101." The cases *pro* and *con* are not in accord among themselves in their reasoning. Perhaps a strict rule to apply to all cases should not be laid down as much depends upon circumstances. The attorney general argues that express authority to refuse to audit a claim such as that here in question is given to the auditor by the clause in section 1514 of the Revised Laws, which provides that "he shall have the power by withholding his approval when necessary, to prevent the misappropriation of public funds, as well as the disbursement of public moneys in excess of specific appropriations." But the term "misappropriation" as there used evidently has reference to the use of public moneys for purposes other than those

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for which they have been specifically appropriated, or assigned, by an act of the legislature. The question here is whether the auditor may refuse to audit, or issue a warrant for, a claim for which there is, concededly, a specific appropriation, on the ground that the appropriation is, itself, void. The answer is to be found in general considerations rather than in any specific provision of the statute. By virtue of his position the auditor of the Territory is the public guardian of the expenditure of the people's money. In so far as that money has been legally assigned by the legislature for application to public purposes it is the auditor's duty to scrutinize the vouchers presented for payment out of designated appropriations, and to satisfy himself as to the correctness of claims made against the public funds. As such guardian, the people would doubtless expect the auditor to refuse to allow a claim presented to him under an appropriation which he had good reason to believe was made by the legislature without authority. Knowledge on his part that the governor had vetoed an appropriation because it was believed to be illegal would be a good reason. An attempted illegal disposition of public funds by the legislature would be something that every tax-payer in the Territory would have the right to complain of. But why should an individual tax-payer, who may not be in a position to know whether a claim will be made for the money, or whether, if made, the auditor intends to allow it, be expected to go to the trouble and expense of instituting what might be distasteful legal proceedings to protect the public treasury, when there is a public guardian who is in a position to know the facts, and who has at his disposal the services of the law officer of the government? Under such circumstances the auditor should by virtue of his position be held to have the authority to invoke the constitutional question in defense of his action. It has not been contended that the auditor has any personal interest in having this statute declared invalid. But this proceeding is, in effect, one against the auditor in his official capacity, and it cannot truly be said

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that in that capacity he has no interest in the question involved. And so it has been held that an auditing officer not only has that authority, but that it is his duty, to refuse to allow a claim made under a statute which he conceives to be invalid, and to assert such invalidity in defense of proceedings brought against him to enforce the allowance of the claim. *State Auditor v. Board of Managers*, 93 Ky. 537; *State v. Hallock*, 16 Nev. 373; *Denman v. Broderick*, 111 Cal. 96; *Com. v. Mathues*, 210 Pa. St. 372; *McDermont v. Dinnie*, 6 N. Dak. 278; *Van Horn v. State*, 46 Neb. 62; *State v. Blumberg*, 46 Wash. 270; *Guthrie Daily Leader v. Cameron*, 3 Okl. 677. A pertinent suggestion is contained in the note to *State v. Heard*, 47 L. R. A. 512, 519, where, after referring to the conflict of authority on the subject, it is said, "There is running through the decisions, however, a thread which would furnish a logical and satisfactory rule upon the question if finally adopted. That is that statutes are generally presumed valid, and ministerial officers must treat them as such until their invalidity is established, but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a mandamus proceeding to enforce it. In other cases he must perform his duty as the statute requires, and leave those whose rights are affected by it to take steps to annul it."

The principle involved is applicable here although this is a summary appeal under the statute (R. L. Sec. 1535). The respective positions of the parties are the same as they would have been in a petition for a writ of mandamus.

The principal question which is presented for decision is whether Act 144 is a valid enactment. The arguments on this question have taken a wide range, but it will not be necessary to discuss all the points in detail. My conclusion that the statute is invalid rests upon certain broad principles the application of which should, I think, be obvious.

The legislative power was conferred by Congress upon the

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legislature of this Territory in broad and liberal terms. *In re Craig*, ante pp. 483, 490. But that power, in its exercise, is subject, nevertheless, to the fundamental doctrine of American law regarding the independence of the three great branches of government. *McCandless v. Campbell*, ante pp. 411, 417. Not only shall the legislature not delegate its functions to either of the other branches, but it may not usurp the functions of either of those two branches. The judiciary, whenever necessary, must protect itself against legislative inroads upon its sphere of action. The guilt or innocence of the appellant of the offense with which he was charged in 1895 was a question of law, the determination of which involved the exercise of the judicial power. The validity of the judgments of the military commission was sustained by this court in *In re Kalaniana'ole*, 10 Haw. 29. The judgment of that tribunal in the case of the appellant was, therefore, conclusive and binding on the legislative and executive departments of the government. The executive could, as it did, exercise its power to pardon, but the exertion of that power, though effectual to completely wipe out the stigma of the conviction, was ineffectual to invalidate the judgment, or to refund the amount of the fine which had been paid in compliance with the judgment. *Knote v. United States*, 95 U. S. 149; *Cook v. Freeholders of Middlesex*, 26 N. J. L. 326; 27 N. J. L. 637.

As the fine so paid pursuant to the judgment of the military commission was beyond the reach of the pardoning power of the executive, so also was it beyond that of the legislative power. *Roberts v. State*, 51 N. Y. S. 691; *Allen v. Board of Auditors*, 122 Mich. 324; *State v. Railroad*, 71 Conn. 43, 49; *Haley v. Clark*, 26 Ala. 439.

In the Connecticut case, above cited, the court said, "The separation of the powers of government into three departments, each of which within its own sphere is supreme, is a constitutional principle which cannot be overturned. The judgment is the final and supreme act of judicial power. The legislature

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cannot overturn judgments any more than the judiciary can make laws. A judgment is based upon established rules and principles administered by the judiciary."

The appropriation of a sum of money by the legislature for the avowed purpose of refunding the amount of a fine paid pursuant to a judgment of a court of competent jurisdiction upon the assumption that the accused was innocent and the judgment erroneous is, clearly, an attempt to repudiate, overturn, and set aside that judgment. If such a thing can be done in one case, it could, of course, be done in all similar cases, thereby establishing the anomalous and untenable situation of the legislature being called upon from time to time to review, revise and upset the verdicts of juries and the findings and judgments of courts.

In *Roberts v. State*, it appeared that one John Roberts had been convicted in New York of the crime of burglary; that after serving nearly two years in the state prison he was pardoned by the governor; that thereafter the state legislature passed an act authorizing Roberts "to present a claim to the board of claims for damages sustained by him by reason of his improper conviction and imprisonment;" that a claim was presented, and the board made an award in the claimant's favor in the sum of \$7500. On appeal, the supreme court set aside the award. The court said, "But why was the conviction of the plaintiff improper? He was found guilty by the court of oyer and terminer of the crime of burglary. The conviction was not improper if he was in fact guilty. It could only have been held improper if, although found guilty, he was in fact innocent. If the act in question shall be deemed a legislative determination that his conviction was improper, the legislature, in its enactment, was compelled to practically annul a judgment duly rendered in the oyer and terminer in 1877. That judgment determined that the plaintiff was guilty. The legislature, by the act in question, in enacting that his conviction was improper, necessarily found that he was innocent. In doing so

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it was compelled to pass upon a question of fact, to invalidate an unreversed judgment fairly obtained, and thus to exercise judicial functions" (p. 694). Also, "For the reasons above stated, and without considering other questions raised in the points submitted to us, we are of the opinion that the judgment rendered in this case cannot be sustained. It would be a matter of regret if we were compelled to hold that the enactment of chapter 342 of the Laws of 1895 was a proper exercise of legislative power. The doctrine has ever been maintained by our courts that a judgment obtained without fraud or duress, either in a civil or criminal court, is a final determination of the rights of the parties, and of the questions necessarily passed upon in its rendition. That the doctrine should be maintained is of the utmost importance. If the act under consideration can be sustained, we see no reason to doubt that, in any case where a criminal has been convicted of crime and imprisoned, the legislature, on his being pardoned, or on the expiration of his term of imprisonment, may retry the question of his guilt or innocence, or authorize a tribunal of its own selection to do so, and may thereupon sanction an allowance of a claim for damages against the state. The effect of holding that the legislature possesses this power would be deplorable. Judgments in criminal cases would only be final, effectual, and valid at the will of the legislature" (p. 696).

The principle would be precisely the same whether the sentence imposed was one of imprisonment or a monetary fine, and whether the attempted compensation should take the form of an act allowing a claim for damages to be made in some tribunal, or of a direct vote of money by the legislature.

The foregoing observations have an important bearing upon the contention made on behalf of the auditor by the attorney general to the effect that the statute in question constitutes an illegal attempt on the part of the legislature to devote public moneys to a purely private purpose—in other words, to make a gift of public funds to a private individual.

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It is fundamental that the legislature has no power to levy taxes except for public purposes, and that the question what constitutes a public purpose is, in the last analysis, a question of law. *Cooley on Taxation* (2nd ed.) 55, 103; *Loan Association v. Topeka*, 20 Wall. 655, 664; *Lowell v. Boston*, 111 Mass. 454; *Bush v. Supervisors*, 159 N. Y. 212; *Perkins v. Milford*, 59 Me. 315; *State v. Osawkee Tp.*, 14 Kan. 322; *Board of Education v. State*, 51 Oh. St. 531; *Brodhead v. Milwaukee*, 19 Wis. 659; *Dodge v. Mission Tp.*, 107 Fed. 827. Also, that it is beyond the power of the legislature to authorize the expenditure of money raised by taxation by way of gift or gratuity to individuals in the absence of, at least, a moral obligation to support the appropriation. *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674; *Mead v. Acton*, 139 Mass. 341; *Lucas County v. State*, 75 Oh. St. 114; *State v. Froehlich*, 118 Wis. 129; *Castner v. Minneapolis*, 92 Minn. 84; *N. Y. Life Ins. Co. v. Commissioners*, 106 Fed. 123; *Parkersburg v. Brown*, 106 U. S. 487; *In re The Queen's Hospital*, 15 Haw. 663.

In *N. Y. Life Ins. Co. v. Commissioners*, the circuit court of appeals said, referring to certain Ohio cases, "We think those last two cases do not sanction the conclusion that the court may sit in review of the legislative discretion, and itself determine the measure or degree of merit which a claim must have to entitle it to favorable consideration at the hands of the legislature. But they do decide that, if the facts upon which the legislature has acted are denied, the court may inquire whether they did in truth exist, and if it clearly appears that the purpose of the act was a private one, and so beyond the pale of legislation, the court will not regard itself as concluded, but will adjudge the act void" (p. 132). Also, that, "It may be conceded that if the legislature, departing from its functions, should, under the guise of legislation, devote public funds to be collected by taxation for an object in no sense public, the judiciary has the authority to interfere and declare such action to be outside of the legislative power, and therefore void, as

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amounting to confiscation. But the rule in such cases is that the violation of the restrictions must be clear and indubitable before such interference is authorized" (p. 133).

"While an enactment is conclusive as to facts it states against those who are within its operation, though not as to such as are not within its enacting part, a mere recital in a statute, either of fact or law, is not conclusive. A court is at liberty to decide the law differently, and to inquire independently as to the truth of the recited facts." Sutherland, *Statutory Construction*, Sec. 213.

In the case at bar the surrounding facts and circumstances are undisputed. After indulging every possible presumption in favor of the validity of the action of the legislature, the facts remain that the fine paid by the appellant went into the public treasury many years ago; and that the judgment, in satisfaction of which the fine was paid, being valid and binding, was and is conclusive on all branches of the government, and no one of those branches can now say aught to the contrary. Under these circumstances it cannot be contended successfully that there is any possible moral obligation owing by the public to the appellant in satisfaction of which public moneys may lawfully be appropriated and paid over to him. The legislature cannot, by thus trespassing upon the judicial power and unearthing controversies which have been set at rest by the courts, uncover supposed moral obligations with a view to arighting what may seem to the legislators to have been acts of injustice.

Counsel for the appellant cite authorities to the effect that all governments are accustomed to recognize and pay moral and equitable claims though there may be no legal liability to pay them. This is conceded; but it is also true that the opinion or finding of the legislature that such an obligation existed is not necessarily binding on the courts. The case of *United States v. Realty Company*, 163 U. S. 427, is cited with apparent confidence. In that case the court was at pains to show that a strong moral obligation existed to support the legislation which

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was there upheld. And the court said, at page 440, "It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises."

In a small community where the judges are often personally acquainted with litigants, and when, at times, the calls of friendship and sympathy beckon aside, it may be difficult, in endeavoring to administer justice, to disregard the appeals and to adhere to the strict path of duty. But there can be only one proper course for a judge to follow.

However laudable may have been the motive which prompted the legislature to enact this statute, to sustain its validity would be to ignore plain legal principles, and to set a precedent which, if followed, would lead to disastrous consequences. The act trenches upon the judicial power, and it constitutes an attempt to divert public funds to private use without any moral obligation or other consideration of public policy to support it. It is not, therefore, a rightful subject of legislation.

In my opinion the ruling of the auditor should be sustained.

PERRY, J., concurring. The preliminary question is presented as to whether the auditor may attack the constitutionality of the statute. It is true that "the objection of unconstitutionality will be listened to only when it is made by one having a legal interest in defeating the statute." *In re Craig*, ante pp. 483, 490; *Territory v. Miguel*, 18 Haw. 402. The present case, however, does not fall within that rule. By R. L., §1514, the auditor is given "the power, by withholding his approval when necessary, to prevent the misappropriation of public funds, as well as the disbursement of public moneys in exercise of specific appropriations." Within the meaning of this section funds are misappropriated, not only when paid under or charged to an appropriation which was not intended to authorize the particular expenditure, but also when paid in the absence of any

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appropriation whatever. If a statute purporting to appropriate moneys is for any reason invalid, it is as though there were no appropriation. The *duty* to prevent misappropriations necessarily accompanies the *power* and is to be performed even though in the performance it becomes necessary to question the constitutionality of a legislative enactment.

Whatever merit there may be in the view that the act is an appropriation of public moneys for a private purpose and constitutes an encroachment upon the judicial power, I think that for another reason it must be declared invalid.

Section 66 of the Organic Act of this Territory provides that "the executive power of the government of the Territory of Hawaii shall be vested in a governor, who * * * may grant pardons or reprieves for offenses against the laws of the United States until the decision of the President is made known thereon." It is well established that whenever by the fundamental law of a State or a Territory or other jurisdiction the power of pardon is vested in an executive officer or board of officers, the grant is exclusive and the power may not, aside from constitutional amendment, be lawfully conferred upon or exercised by the legislative or the judicial department. This is in keeping with the accepted theory of our governments that the three departments, except in so far as may be clearly provided to the contrary, are separate and distinct in their functions and is an application of the rule of construction that the enumeration of the one excludes all others. When, as by our Organic Act, the power is confided to the executive branch of the government it is virtually denied to any other department and cannot, therefore, be exercised by the legislature any more than it could be exercised by the judiciary. In the distribution of the powers of government the framers of the fundamental law, in the case of this Territory the Congress of the United States, have the right to lodge the pardoning power where to them in their wisdom seems best and it is not competent for a lesser authority, in this instance the local legislature, to alter

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the distribution thus made. *Singleton v. State*, 34 L. R. A. 251; *Haley v. Clark*, 26 Ala. 439; *State v. Sloss*, 25 Mo. 291; *State v. Fleming*, 26 Tenn. 151; *Baldwin v. Scoggin*, 15 Ark. 427; *State v. Nichols*, 26 Ark. 74; *Ogletree v. Dozier*, 59 Ga. 800; *Rich v. Chamberlain*, 104 Mich. 436; *Forsyth v. County*, 141 N. Y. 288; *State v. Kirby*, 51 So. (Miss.) 811; *Ex parte Garland*, 4 Wall. 333; *U. S. v. Klein*, 13 Wall. 128; Cooley, Constitutional Limitations, 7th ed., 243; 8 Cyc. 829. The statement in *U. S. v. Hall*, 53 Fed. 352, to the effect that a constitutional grant of the pardoning power to an executive officer is not exclusive is opposed to the weight of authority and, as I think, of reason.

It is equally clear that the power confided by Congress to the governor of Hawaii to grant pardons refers to and includes all manner of pardons known to the law and includes, more specifically, pardons which are partial in their operation as well as those which are full and absolute. The greater necessarily includes the less. Under the authority vested in him by section 66 the governor may in any case remit the fine imposed under the judicial sentence and leave all of the other penalties and disabilities in full force. 2 Story on the Constitution, §1504; 1 Bishop Crim. Law, §760; *Ex parte Wells*, 18 How. 307; *Perkins v. Stevens*, 24 Pick. 277; *Holliday v. The People*, 10 Ill. 214; *Cook v. Freeholders*, 26 N. J. L. 326; 24 Am. & Eng. Ency. L., 566, 567; 29 Cyc. 1569.

Act 144 of the Laws of 1911 was enacted in violation of these principles. It is in effect an attempt on the part of the legislature to exercise the pardoning power. The J. A. Cummins named in the act was in the early part of 1895 duly convicted (upon a plea of guilty) by a lawfully constituted judicial tribunal, to wit, a military commission, having jurisdiction of the subject-matter and of the person (*In re J. C. Kalaniana'ole*, 10 Haw. 29) and was by the commission sentenced to be imprisoned at hard labor for the term of five years and to pay a fine of five thousand dollars. Subsequently Sanford B. Dole,

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as President of the Republic and Commander-in-Chief of its military forces, upon the recommendation of the cabinet, mitigated and modified the sentence so as to require the accused merely to pay the fine and to be imprisoned until it be paid; and the fine was paid. That portion of the sentence relating to the fine remains judicially unreversed and as to it the pardoning power, whether invoked or not, has not been exercised by those in whom it was reposed. The "full and free" pardon granted by the President of the Republic of Hawaii in July, 1898, cannot correctly be construed as intended to absolve Cummins from the fine which he had already paid and does not have that effect. It relates solely to the civil disabilities which he was still under in consequence of the conviction. The appropriation was intended to be not in aid of any pardon granted by the executive department but in spite of the executive's refusal or failure to pardon. From the recitals in Act 144 it would seem that the only reason for its enactment was that the legislature felt satisfied that the appellant pleaded guilty through inadvertence and misunderstanding, that the conviction was erroneous or unjust and that the appellant was in fact not guilty of the offense charged,—in other words was dissatisfied with the judgment of the judicial tribunal acting within its powers and therefore wished to render its sentence nugatory. However that may be, the effect of the appropriation, expressly stated to be "for the purpose of refunding to said J. A. Cummins the fine," and of its enforcement, would be to remit the fine judicially imposed,—just as clearly as though an act to relieve Cummins from the necessity of paying it had been passed prior to its payment. "It never could have been the intention of the framers" of our Organic Act "to prohibit the legislature from remitting a fine and yet allow that body to accomplish the same result by compelling the fine when paid to be refunded. If that could be done, the prohibition would be nugatory." *Haley v. Clark*, supra. See also *Singleton v. State* and other authorities supra. That which the legislature may

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not do directly, it may not do by indirection. The mere lapse of time since the conviction and sentence is immaterial. If the legislature may accomplish this result at the end of sixteen years, it may do so sixteen months or sixteen days after sentence.

It has been said in argument that the act cannot be an exercise of the pardoning power vested in the governor because at the time of its enactment, after the payment of the fine, the governor had not any power to pardon. It seems to me that this attempted answer is insufficient. A pardon "is an act of grace * * * - which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *U. S. v. Wilson*, 7 Peters 149, 160. The statute under consideration is an act of grace exempting the present appellant from punishment which has been judicially inflicted upon him for a crime of which he was duly convicted. The character of the statute as an act of grace exempting from punishment is not affected by the mere fact that the act was done after the payment of the fine into the governmental treasury. The power to bestow such an exemption is by our fundamental law vested in the governor alone. That as to the remission of a fine it can be exercised, if at all, only within a stated time, that is to say, before payment of the fine, does not operate to make the grant any the less exclusive or to transfer it to the legislative department after the expiration of the time stated.

For these reasons I concur in the conclusion that the ruling of the auditor should be sustained.

DE BOLT, J., dissenting. I concur in the opinion of Mr. Chief Justice Robertson as to the right of the auditor to raise the question as to the validity of the statute; but as to the merits of the appeal I am unable to concur in either of the foregoing opinions, or in the conclusion reached by the majority. The chief justice concludes that the statute in question is invalid because it "trenches upon the judicial power, and it constitutes

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an attempt to divert public funds to private use without any moral obligation or other consideration of public policy to support it." Mr. Justice Perry concurs in the conclusion reached by the chief justice, but upon the ground that the statute "is in effect an attempt on the part of the legislature to exercise the pardoning power."

As I view the questions involved in this appeal, the legislature in the enactment of this statute did not trench upon or attempt to exercise any of the powers of either of the other two co-ordinate branches of the government, they having fully exercised all their powers in the premises, but it acted wholly within its own province, exercising its legislative discretion upon one of the "rightful subjects of legislation." Sec. 55, Org. Act; 28 Am. & Eng. Ency. Law (2d ed), 60; *Maynard v. Hill*, 125 U. S. 190.

The Organic Act transferred from Congress to the territorial legislature the power to pass laws for the people of the Territory, and it takes the place of a constitution as a fundamental law of the local government. 28 Am. & Eng. Ency. Law (2d ed), 59; *Ferris v. Higley*, 20 Wall. (U. S.) 375; *Nat'l. Bank v. Yankton County*, 101 U. S. 129.

The conclusion reached by the majority, each member by a separate and distinct process of reasoning, is, in effect, a holding that the statute is unconstitutional. Can it be successfully claimed that the invalidity of the statute is placed beyond reasonable doubt when the members of the court declaring it invalid are each unable to adopt the reasoning of the other? Presumably each entertains doubt as to the soundness of the views expressed by the other. "If it be doubtful, and the legislature has seen proper to exercise the power, the judiciary should not interfere. The doubt is then to be solved in favor of the legislative action." *Norman v. Ky. Bd. Managers World's Columbian Exp.*, 20 S. W. 901. "A statute will not be declared void in whole or in part, unless its invalidity is distinctly pointed out and made clearly manifest. The general rule is

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that every intendment must be given in its favor." *Crowley v. State*, 11 Org. 512.

"It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.

"The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case." Cooley's Const. Lim. (7th ed), 109, 252. The rule is universal that courts will presume in favor of the constitutionality of a law, until the contrary clearly appears. *Adams v. Storey*, Fed. Cas. No. 66; *U. S. v. Mackenzie*, Fed. Cas. No. 18,313; 6 Am. & Eng. Ency. Law (2d ed), 1086; 8 Cyc. 801. But, as I view the statute, there is no occasion to indulge in presumptions in favor of its validity. To my mind it is clear that the legislature had the power to pass it, and having done so, we are not concerned in the motives or reasons which prompted its enactment. Cooley's Const. Lim. (7th ed), 257; 6 Am. & Eng. Ency. Law (2d ed), 1087; 8 Cyc. 804.

The chief justice, upon the proposition that the statute trenches upon the judicial power, cites the following cases: *Knote v. United States*, 95 U. S. 149; *Roberts v. State*, 51 N. Y. S. 691; *Allen v. Board of Auditors*, 122 Mich. 324; *State v. Railroad*, 71 Conn. 43; *Haley v. Clark*, 26 Ala. 439. Let us examine these cases in the order named.

Knote v. United States, as I read it, does not in any way militate against the validity of the statute before us, but on

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the contrary, it clearly recognizes the doctrine for which the appellant contends, namely, that when money, as a fine, penalty or forfeiture, has been paid into the treasury the judicial and executive departments of government thereby lose all jurisdiction, power and control over it, and that the legislative department thereupon acquires sole and exclusive power over it and it can only be withdrawn by an appropriation by law. Art. 1, Sec. 9, Constitution of the United States; Secs. 52, 55, Org. Act. Observe the following language, quoting from page 154 of the case cited: "If the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." There is not even an intimation by the court that the suggested legislation for the express purpose of withdrawing the money from the treasury for the purpose of refunding it would, in any way whatsoever, "trench" upon or be an attempt to "exercise" any of the "powers" of either of the other coordinate branches of the government, although the property of the claimant had been seized by the Federal authorities and declared forfeited, was sold, and the proceeds paid into the treasury, in pursuance of an order of a court of competent jurisdiction as a punishment for his treason and rebellion, for which he was subsequently pardoned. To the same effect, see *United States v. Padelford*, 9 Wall. (U. S.) 531; *Osborn v. United States*, 91 U. S. 474; *Armstrong's Foundry*, 73 U. S. 766; *Ill. Cent. R. R. Co. v. Bosworth*, 133 U. S. 92; 2 Op. Atty.-Gen. 329; 8 Op. Atty.-Gen. 281; 14 Op. Atty.-Gen. 599; 16 Op. Atty.-Gen. 1.

In *Roberts v. State*, Roberts was convicted and sentenced to the state prison for a period of twenty years, and after serving about two years he was pardoned. The legislature then passed an act authorizing him to present a claim to the board of claims for damages sustained by him by reason of his improper con-

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viction and imprisonment and to award such compensation as should appear just and reasonable. It is apparent that Roberts proceeded upon the theory that he had a valid claim against the State, such as a court of law could entertain. The court in that case said: "We conclude that, if the statute in question did not have the effect of validating or creating the claim of the plaintiff presented to the court below, it was ineffectual; and a finding of that court cannot be sustained, as in that case no legal demand existed in favor of the plaintiff against the state." It is clear that the court did not have before it, or consider, the question as to the power of the legislature to make an appropriation for the payment of a claim such as is now before this court. The case is clearly distinguishable from the case at bar.

In *Allen v. Board of Auditors*, Allen had been convicted and sentenced to imprisonment for a term of years and after serving a portion of his term he was pardoned, whereupon the legislature passed a joint resolution directing the board of state auditors to investigate his claim, and if found to be true, i. e., innocent, to allow him a sum not to exceed ten dollars per month for a period not to exceed ten years. The court held that the joint resolution was an attempt on the part of the legislature to create a court of appeals, aside from the constitutional courts, to determine the guilt or innocence of a convicted criminal, which was "a violation of the plain provisions of the constitution establishing courts, and conferring the exclusive jurisdiction upon them to try civil and criminal cases." It is obvious that no such questions are involved in the case at bar. The question as to the power of the legislature to make an appropriation in a case similar to the one under consideration was not before the court in that case. One of the reasons which the court assigned why Allen was not entitled to anything was, that "the state received nothing, but, on the contrary, incurred expense, by reason of his arrest, trial and imprisonment," which reason does not exist in the case at bar. The appellant

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caused the government but little, or no expense, and, moreover, the people have had the use of the \$5000 he paid as a fine for over sixteen years, interest on which, at the legal rate would now amount to about \$5000, which the appellant does not ask for.

Viewing the matter from the standpoint of the people—the tax-payers—there is an important, practical distinction, financially, between punishment by imprisonment and punishment by fine. In the case of imprisonment, in the event of an appropriation being made for the benefit of the person who has suffered, the money must necessarily be raised by taxation, i. e., paid by the people; while in the case of a fine, the appropriation is simply a refunding of the money to the person who paid it into the treasury, which does not involve a question of taxation or payment by the people.

State v. Railroad did not involve any question such as we are called upon to determine in this appeal. In that case it appears that after the court had entered judgment requiring the respondent to construct a certain bridge over its railroad, the legislature passed an act providing that no structure should be built over any railroad, until the railroad commissioners should have determined the length, width, material and plan of the structure, its height above the roadbed, and the necessity for its construction. An alternative writ of mandamus having issued to compel the respondent to construct the bridge in question, respondent moved to quash the writ on the ground, inter alia, that the railroad commissioners had not determined the matters required of them by the statute. The court overruled the motion and issued a peremptory writ. The respondent appealed. The appellate court in affirming the action of the lower court held, "that inasmuch as the language of the Act did not expressly nor by necessary implication make it applicable to pending cases—much less to cases already adjudicated—the Act could not be construed to affect such cases. Whether the legislature has the power, under the Constitution of this State,

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to open or vacate final judgments and provide another tribunal or retry matters once determined by the judicial department, *quaere*." The statute in question does not attempt to open or vacate any judgment, nor to provide another tribunal to retry matters heretofore determined.

Haley v. Clark, was an application for a writ of mandamus to compel Clark, as county treasurer, to pay to Haley and three others the sum of \$500, which he was directed to pay to them by an act of the legislature, entitled, "An act for the relief of securities of John Douglass, late clerk of the Circuit Court of Marion County." Clark demurred on the ground that the act was unconstitutional. The demurrer was sustained and the applicants for the writ appealed. Douglass, by reason of some delinquency, became liable to a fine of \$500, for the payment of which, the appellants were his sureties. Douglass having failed to pay the fine the sureties paid it. The case does not disclose upon what grounds the act was based. It is evident, however, that it was not founded upon any equitable or moral obligation, such as exist in the case at bar. So far as we are able to gather from the language of the case, the act was a mere gift, "a donation," as counsel for the appellant admitted. The court, however, proceeded upon the theory that the act in question was an attempt to remit a fine, that is to exercise the pardoning power. Assuming that no pardon had been granted in that case, the stain and stigma of the offense, of course, remained. This could only be removed by a full pardon, and thus an attempt to "remit" the fine was an attempt to exercise some part or all of the pardoning power. But where a full pardon has been granted there remains no stain, no stigma, no penalty, no fine—all have been remitted—although the money paid as a fine may have passed beyond the reach of the pardoning power, and for that reason cannot be refunded, except by an act of the legislature. In the case at bar there remains no fine to remit, that was included in the pardon. The money paid as a fine, however, can and should be refunded by authority of the

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legislature—the only department of the government having any power over it.

Mr. Justice Perry also cites *Haley v. Clark*. Therefore, what I have to say on the point suggested by that case may be stated now; and in this connection I cite *Cook v. Freeholders of Middlesex*, 26 N. J. L. 326, 328, wherein the court said: "There is no doubt that the word *remit* is sometimes used in the sense of return or restoration, though in this sense Dr. Johnson says that the word is obsolete. So in case of 'remitter' it is said, by Blackstone, that the party is remitted, or sent back by operation of law to his ancient and more certain title. 3 Black. Com. 20. But as applied to the penalty of crime, the word has a totally different signification. It is used as equivalent to pardon or discharge from the penalty of transgression. 'To remit' is defined by our best lexicographers to be to forgive, to pardon, to release from punishment or penalty. It is so uniformly used in that rich mine of pure Anglo-Saxon, the English translation of the New Testament, numerous instances of which will occur to every familiar reader of that volume. Thus in *John XX.*: 23, 'whomsoever sins ye remit they are remitted.' It is used by legal writers to import discharge from the penalty of transgression. In this sense, Blackstone uses it when he says the punishment of the offender may be remitted and discharged by the concurrence of all parties interested. 4 Black. Com. 316. Pardon, in the law, is the remitting or forgiving of an offense committed against the King. Jacobs Law Dict., 'Pardon.' A full and free pardon in itself, necessarily involves a remission of the penalty of the crime. Hawk., b. 2, 37, §48. It is absurd to think of a man's being pardoned, and yet left to pay the fine, to suffer imprisonment, or to endure any of the penalties of his transgression, subsequent to his pardon."

The legislature in the enactment of the statute before us did not attempt to give or donate money to Mr. Cummins as a mere gratuity; nor did it attempt to remit a fine; nor did it attempt

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to interfere with or in any way to question the judgment of the military commission. The matter had passed beyond the control of the judiciary and executive. The power of each had been fully exercised. But, considering the equity and natural justice of the claim, as well as other proper matters, including the historical events covering the period of transition from the Monarchy to the organization of the Territory, that there was strife and turmoil in the land, and that the political and economical views of honest men were in conflict, all of which we are bound to assume the legislature considered, and in the exercise of its legislative discretion, which we have no right to question, it appropriated \$5000 for the purpose of refunding, not giving, to Mr. Cummins the amount of the fine,—not to remit, forgive, or pardon,—because the executive had already performed that act of clemency without limitation.

Whether the claim was founded on the broad principles of equity and natural justice, and should or should not have been recognized, was a legislative and not a judicial question. The legislature having determined this question, the judiciary is bound. Courts have no more right to review the exercise of legislative discretion than the legislature has to meddle with the judgments of the courts. Each, within its own province, is supreme and independent, and neither is answerable to the other for its errors or failure to fulfill its mission in the governmental scheme.

The claim in question being founded upon equity and natural justice, it was within the power of the legislature to recognize it as a debt due from the people to Mr. Cummins. In *United States v. Realty Co.*, 163 U. S. 427, 440, the court said: "Under the provisions of the Constitution, (article 1, section 8,) Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of

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this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity."

Cooley on Taxation (pp. 69, 91), lays down the same broad, humane principles, as expressed in the case just cited. See also *Brewster v. City of Syracuse*, 19 N. Y. 116; *United States v. Weld*, 127 U. S. 51; *Williams v. Heard*, 140 U. S. 529; *Comegys v. Vasse*, 1 Pét. (U. S.) 193; *Emerson v. Hall*, 13 Pét. (U. S.) 409; *United States v. Jordan*, 112 U. S. 418; *Booth v. Town of Woodbury*, 32 Conn. 118, 128; *Agnew v. Brail*, 124 Ill. 312, 316; *Blanding v. Burr*, 13 Cal. 343, 354; *In re Flournoy*, Atty.-Gen., 1 Ga. 606; *Cook v. Freeholders of*

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Middlesex, 27 N. J. L. 637, 643; *Cope v. Com.*, 28 Pa. St. 297; *Guilford v. Chenango County*, 13 N. Y. 143.

As to the pardoning power, I agree with Mr. Justice Perry, that it is vested in the executive and cannot be exercised by either of the other departments of the government.

Mr. Cummins having paid the fine imposed upon him and the money with which the fine was paid having been covered into the treasury, he was subsequently granted a full pardon.

"A pardon is an act of grace which proceeds from the power intrusted with the execution of the laws, and exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime that he has committed.

"A pardon is full or absolute when it freely and unconditionally absolves the party from all the legal consequences of his crime and his conviction, direct and collateral; including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." 24 Am. & Eng. Ency. Law (2d ed), 551; 29 Cyc. 1559, 1566.

While a full pardon puts an end to all further punishment, it does not afford any relief for what has been suffered (29 Cyc. 1567), because a pardon is not retrospective, it does not operate upon that part of the sentence which has been executed. But it blots out the crime and removes the stain and stigma of the offense committed. A fine, if it has not been paid into the treasury, i. e., if it remains within the scope of the pardoning power, it is impliedly remitted, forgiven, as an incident to the pardon. If, however, the fine has been paid into the treasury, obviously, it has passed beyond the power and control of the executive to refund, although the crime, of which it was an incident, has been absolutely obliterated—every stain of it washed away. "A pardon is an act of grace by which the offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power." *Ill. Cent. R. R. v. Bosworth*, 133 U. S. 92, 104. On the other hand, should the legislature, before the fine is paid into

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the treasury, as well as before the exercise of executive clemency, attempt to *remit* the fine, unquestionably, that would, not only be an attempt to exercise the pardoning power, but it would also be an interference with the judgment of the court. Neither department of the government can invade the province of another or assume any power over any matter under the control of either of the others. This view is practical, and as matters pass from the control of one to another, the power of the former ceases and the power of the latter may be invoked. This affords a full and complete exercise of all the functions of each department, and is in perfect harmony with constitutional requirements and inhibitions.

The cases cited by Mr. Justice Perry on this phase of the question are, as it seems to me, clearly distinguishable from the case at bar. Many of the observations there expressed I accept unhesitatingly.

In *Singleton v. State*, 34 L. R. A. 251, the legislature attempted to restore to Singleton, who had been convicted of the crime of larceny, his civil rights. The mere statement of this proposition shows that the legislature attempted to exercise the pardoning power.

In *State v. Sloss*, 25 Mo. 291, the legislature attempted to release Sloss, as well as others, then indicted for certain offenses. Obviously, this was an unconstitutional act.

In *State v. Fleming*, 26 Tenn. 151, the legislature, by resolution, attempted to discharge Fleming and another who were indicted for selling spirituous liquors. Comment is unnecessary.

In *Baldwin v. Scoggin*, 15 Ark. 427, two persons had been fined in a certain sum for which a promissory note had been given and before its payment the governor pardoned the defendants, thus remitting the fine, which, of course, had not passed into the treasury, but remained under his control. As the court said in that case, "a note so given and received in such case, being no payment or satisfaction, the fine had not

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passed beyond the pardoning power of the governor."

State v. Nichols, 26 Ark. 74, does not seem to have any bearing upon any phase of the question before us for consideration. The court indulges in quite a lengthy discussion as to the pardoning power not naturally or necessarily being an executive function.

In *Ogletree v. Dozier*, 59 Ga. 800, it appears that one Moore had been sentenced "to work on the chain-gang." The county commissioners, under an act of the legislature, hired him to Ogletree to work on his plantation, or elsewhere, at Ogletree's pleasure. Ogletree demanded Moore from the sheriff, who refused to give him up. Ogletree brought habeas corpus. The court held that the act of the legislature, so far as it permitted the change of the sentence of the court from work on the chain-gang to the hire of the convict to a private person for private work, was unconstitutional.

Rich v. Chamberlain, 104 Mich. 436, simply shows that an act of the legislature, which provides for an "Advisory Board in the Matter of Pardons," and determines its powers and duties is not in conflict with section 11, art. 5, of the Constitution, which vests the pardoning power exclusively in the governor, "subject to regulations provided by law relative to the manner of applying for pardons."

Forsyth v. County, 141 N. Y. 288, merely holds that a statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, is not violative of the provision of the state constitution (§5, art. 4) giving to the governor the power to grant reprieves and pardons. See *Rep. Haw. v. Pedro*, 11 Haw. 287; R. L. Chap. 184.

In *State v. Kirby*, 51 So. 811, held that an act authorizing the board of supervisors to discharge a convict from jail, if unable to labor from bodily infirmity, violates the constitution which confers upon the governor the sole power to pardon.

Having examined other cases cited and feeling that they are not in conflict with the views which I have endeavored to set

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forth in this opinion, I deem it unnecessary to prolong the matter. I am of the opinion that Act 144 of the Laws of 1911 is valid and constitutional.

Lorrin Andrews and *Eugene Murphy* for appellant.

Alexander Lindsay, Jr., Attorney General, for the Auditor.

TERRITORY OF HAWAII, BY MARSTON CAMPBELL,
COMMISSIONER OF PUBLIC LANDS *v.* KAPIOLANI ESTATE, LIMITED, A CORPORATION, AND
LEE HOU, LEE SAU (NO. 1), LEE SAU (NO. 2),
LEE CAN HING, SAN TAI, YEE KAN CHONG,
LEE CHOY TIN, LEE SAN YEE, LAM MAN PING,
LEONG NEE HUNG, LEE CHING, AND LEE
LUNG, COPARTNERS DOING BUSINESS IN HO-
NOLULU UNDER THE FIRM NAME AND STYLE
OF HOP SING COMPANY.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 14, 1911.

DECIDED JUNE 20, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PROCESS—*certificate of copy by sheriff.*

Under R. L., §1721, the copy of the summons and of the petition may be certified by any one of the officers designated to whom the documents have been entrusted for service.

JUDGMENT—*reopening default—necessity of stating facts constituting defense.*

In an affidavit in support of an application to set aside a default the statement that the appellant has a good and meritorious defense is insufficient. The facts relied upon should be set forth in order that the court may judge whether the defense is meritorious.

COURTS—*power to make rules.*

The rule of the circuit court of the first circuit which assigns all jury-waived cases to the third judge for trial is, if intended to deprive the other judges of jurisdiction to hear such cases, invalid.

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JUDGES—*disqualification.*

Under section 84 of the Organic Act a judge is not disqualified to hear an action of ejectment by reason of the fact that he was of counsel in an earlier action (for summary possession) in which the title to the same land was involved.

OPINION OF THE COURT BY PERRY, J.

This was an action of ejectment relating to certain land in Manoa, Honolulu, Oahu, and was tried without the intervention of a jury and judgment rendered for the plaintiff for restitution of the land and for \$750 damages. The Kapiolani Estate, Limited, one of the defendants, thereupon sued out a writ of error. The assignments argued will be referred to in their order.

The copy of the summons served upon the appellant was certified by "Patrick Gleason, Deputy High Sheriff," to be a true copy of the original on file in the court. Section 1721 of the Revised Laws provides that "every summons issued under the seal of a court of record shall be served by the high sheriff or his deputy * * * upon the defendant by delivery to him of a certified copy thereof" but does not specify by whom the certificate is to be made. The present appellant moved to set aside the service on the ground that the certificate was not by a person authorized by law to make the same and the motion was denied. The precise point here involved was considered in *Pasquoin v. Sanders*, ante 352, and decided adversely to the defendant's present contention. It was held in that case that "under R. L., §1721, the copy of the summons and of the petition may be certified by any one of the officers designated to whom the documents have been entrusted for service." No reason satisfactory to our minds has been suggested by counsel and none has occurred to us for departing from the construction thus placed upon the statute. The ruling assigned as error was correct.

Upon the defendant's failure to answer or otherwise plead within the time required by law an order was, on the plain-

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tiff's motion, entered declaring it to be in default. The Kapiolani Estate, Limited, subsequently moved to set aside the default, presenting in support of the motion two affidavits. In the latter it is asserted that an officer of the defendant corporation employed counsel to defend the action, made to him a full and clear statement of the facts constituting the corporation's defense, was advised by the attorney that the defendants had a full and complete defense to the action on the merits, and that the attorney, presumably by reason of illness, overlooked and neglected the preparation and filing of a defense to the action. No showing was made in support of the motion as to what the facts were constituting the alleged defense. Under the circumstances it was not an abuse of discretion for the trial judge to refuse to reopen the default. In *Ayers v. Mahuka*, 9 Haw. 377, 399, it was clearly held, with reference to a similar motion to set aside a default: "The affidavits are also insufficient in not disclosing the facts relied upon in defense. It is not sufficient to state that 'defendant has a good and meritorious defense' without setting out what it is so that the court can judge whether it is meritorious."

The defendant objected to the Honorable William L. Whitney, judge of the circuit court of the first circuit, hearing the case on the ground, first, that one of the rules of that court, at that time in force, provided that all jury waived cases should be heard by the third judge, and, second, that Judge Whitney had been of counsel for the plaintiff at an earlier stage of the same case. If the circuit court rule in question cannot be regarded as directory merely or as leaving discretionary power in each of the judges of the first circuit to hear and determine, as occasion may require, causes not allotted to him under the rule,—if, in other words, it must be regarded as depriving each judge of jurisdiction to hear, without the consent of one or both of the other judges, cases not so allotted to him, the rule is invalid. The power granted by section 1659 of the Revised Laws to "a majority of the circuit judges" to make rules "for regu-

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lating the practice and conducting the business of the circuit courts in all matters not expressly provided by law" and any power to make rules which the judges of the first circuit may have aside from the section just quoted are always subject to the limitation that the rules shall not be in conflict with any valid existing statute. The statutes confer jurisdiction upon each of the three judges to preside at trials in term cases and to hear and determine jury-waived cases. The rule in question cannot operate to deprive any one of the judges of that jurisdiction.

The service rendered by Judge Whitney as attorney for the Territory was in a case brought by the Territory against the Kapiolani Estate, Limited, as the sole defendant, in the district court of Honolulu and thereafter appealed from that court to the circuit court of the first circuit and from the latter to the supreme court of the Territory. The earlier case was a proceeding for summary possession of the same land involved in the present action, and of other lands. In the earlier case, after a decision by this court affirming a judgment of restitution of the property to the plaintiff, a writ of possession and of execution was issued and returned by the sheriff as executed with reference to the possession only. Whether this return was untrue in fact or whether the defendants subsequently re-entered does not appear, but evidence was introduced at the trial of this action tending to show that for some time prior to the institution of these proceedings the defendants had been in occupation of the land. Section 84 of the Organic Act, as amended by the Act of May 27, 1910, provides, inter alia, "Nor shall any person sit as a judge in any case in which he has been of counsel." The action for summary possession and the present action of ejectment cannot properly be said to be one and the same case within the meaning of that section. Even if the title to the land which is the subject of the controversy in this proceeding was also involved in the earlier one, the two are separate and distinct cases. *Taylor v. Williams*, 26 Tex. 583.

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The only remaining assignment referred to in the appellant's brief is to the effect that the decision and the judgment were contrary to the law and the evidence and the only point suggested under that assignment is that "nothing in the evidence offered and received upon the trial of this case authorized the circuit court to decide, as it did decide, namely, that the title of the land here in question was, at the time of the bringing of this action, in the United States with the right of possession in the Territory of Hawaii" and that "the crown lands were and are private property." The land in question was shown to have been a part of the crown lands. In appellant's brief it is expressly stated that "it is not the purpose to here re-argue that question" (of the ownership of the crown lands). The point with reference to this very land in Manoa was disposed of in the action for summary possession (*Territory v. Kapiolani Estate, Limited*, 18 Haw. 640), where it was held that "The court takes judicial notice that the title in the lands formerly known as crown land is now in the United States and that the Territory is by law entitled to re-enter and recover possession for non-payment of rent," and that "a claim that Art. 95 constitution of the Republic of Hawaii is invalid, which declares that the portion of the public domain theretofore known as crown lands then was, and theretofore had been, the property of the Hawaiian government, does not present a question for judicial inquiry." Under the circumstances a re-examination of the subject is not required.

The judgment of the circuit court is affirmed.

E. W. Sutton, Deputy Attorney General (*Alexander Lindsay, Jr.*, Attorney General, with him on the brief), for plaintiff.

C. W. Ashford for defendants.

Guardianship of Hitchcock, 20 Haw. 553.

IN THE MATTER OF THE GUARDIANSHIP OF
HILDRETH CASTLE HITCHCOCK, A MINOR.

RESERVED QUESTION FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

SUBMITTED JUNE 14, 1911.

DECIDED JUNE 21, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGES—*disqualification of.*

A circuit judge, who, previous to his appointment, acted as counsel for the petitioner in a petition for the appointment of a guardian, is not disqualified under Sec. 84 of the Organic Act, as amended May 27, 1910, from making an order requiring the guardian to file an inventory and account.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Perry, J., dissenting.)

The facts here involved are, in substance, as follows: On December 2nd 1901, the will of the late Edward N. Hitchcock, deceased, was duly admitted to probate by the circuit judge of the fourth judicial circuit; that in said will the testator named his wife as guardian of the person and property of their daughter, Hildreth Castle Hitchcock, to whom he had bequeathed a portion of the proceeds of a certain life insurance policy; that on December 5th, Clare Fassett Hitchcock, widow of the testator, now Mrs. E. H. Moses, was, upon her petition filed for the purpose before the said circuit judge, sitting at chambers, in probate, appointed guardian of the person and estate of her said daughter, she being a minor; that the law firm of which the present judge of said circuit court was then a member were counsel for the petitioner in that proceeding; that, on April 21st 1911, the circuit judge, of his own motion, made an order, which bears the same title as do the papers in the original proceeding, directing the said guardian to "file in this court and cause, within one month from and after the date of service of this order, a duly authenticated inventory of all the property of said minor which has come into the possession of said guardian and also an itemized and duly authenticated ac-

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count of all receipts and disbursements on account of the estate of said ward from the inception of said guardianship;" that Mrs. Moses then filed a paper entitled "Response of Guardian" in which she alleged that having been appointed guardian of her said daughter in and by the will of the child's father, her appointment as such guardian by the circuit judge sitting in probate was nugatory and void, and that she is under no legal obligation to file an account pursuant to the order of the judge for the reason that the accounts of testamentary guardians are cognizable only in a court of equity; that a suggestion of disqualification was also filed in which the point was raised that the present circuit judge is disqualified "to make any order in the said cause and is disqualified to sit as a judge in this case," because of his having acted as counsel as aforesaid.

The question reserved for this court is stated as follows: "Is the judge of this Fourth Circuit Court, sitting in Probate, by reason of his having acted as one of the attorneys for Clare Fassett Hitchcock in presenting her petition and securing her appointment in 1901 as guardian of Hildreth Castle Hitchcock, a minor, disqualified from hearing and determining the question raised by the order directing said guardian to file her inventory and accounts and said guardian's response to said order?"

Section 84 of the Organic Act, as amended by an Act of Congress approved the 27th day of May 1910, provides, "That no person shall sit as a judge * * * in any case in which he has been of counsel."

"A case is a contested question before a court of justice; a suit or action; a cause; a state of facts involving a question for discussion or decision, especially a cause or suit in court." 5 Am. & Eng. Enc. Law (2nd Ed.), 748.

"The primary meaning of the word case, according to lexicographers, is cause. When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice." *Kundolf v. Thalheimer*, 12 N. Y. 593, 596.

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"The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in a court, a suit, or action." *Blyew v. United States*, 13 Wall. 581, 595.

In order to constitute a proceeding in court a "case" it is not necessary that there should have been a contest. An *ex parte* proceeding may be a case within the usual acceptance of the word.

The proceeding had before the circuit judge in which Mrs. Moses was appointed guardian of the person and property of her daughter was undoubtedly a case within the meaning of the statute. That case ended, however, with the entry of the order appointing the guardian. That was a final and appealable order. It accomplished and ended the purpose for which the proceeding was commenced. The actions of the guardian with respect to the administration of the trust are matters which have occurred since her appointment, and as to which it does not appear that the judge gave advice or had any connection as an attorney. The fact that the papers in the present proceeding bear the same title as those in the former proceeding does not necessarily make the two proceedings parts of the same case. Nor does the fact that the validity of the order made in the first proceeding may be questioned in the present proceeding disqualify the judge.

Assuming that the order of the circuit judge directing the guardian to file an inventory and account is to be regarded as a case, or a step in a case, rather than as a mere direction to an officer of the court, it must be considered a new and distinct case. It is not the case in which the judge acted as counsel.

A judge is not disqualified from hearing a case because it has grown out of a previous case in which he acted as counsel. *The Richmond*, 9 Fed. 863; *Stevens v. Hall*, 8 Idaho 549. Nor where the judgment in the first case is incidentally involved in the second case. *Clemons v. Clemons*, 69 Vt. 545. Nor where the second case is in aid of the judgment in the first case.

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Keeffe v. Third Nat. Bank, 177 N. Y. 305. Nor where the first case involved some of the issues raised in the second. *Craufurd's Adm. v. Craufurd*, 22 Md. 447, 459; *Cleghorn v. Cleghorn*, 66 Cal. 309. In *Conyers v. Ford* (Ga.), 36 S. E. 947, it was held that a judge who, as attorney, had secured the appointment of a receiver was not disqualified from hearing a case subsequently brought by the receiver.

In *Territory v. Kapiolani Estate*, just decided, we held that a judge was not disqualified from trying an action of ejectment because of his having acted as attorney for one of the parties in a prior action of summary possession involving the same land. Although the action of ejectment was a continuation of the controversy which gave rise to the suit for summary possession, it was not the same case within the contemplation of the statute.

In *In re Estate of Banning*, 9 Haw. 354, 356, construing the statute (now R. L. Sec. 1634, as amended) which provided that in case of the disqualification or absence of a justice of this court his place should be filled by one of the circuit judges who had had "no connection with the said cause whether as counsel or in his official capacity," it was said, "if the circuit judge had admitted a certain will to probate and the decision appealed from was the allowance of the executor's accounts by another circuit judge, he would not be disqualified. The estate in probate is not the 'cause.' The 'cause' meant in the statute is the exact case or issue brought up to the Supreme Court by the appeal."

The attorney for the guardian suggests that the judge would be disqualified on account of interest should the matter of the guardian's accounts come before him because it would become necessary for him to decide upon the reasonableness of the fee paid him by the guardian as her attorney in the proceeding for her appointment. The question of the possible disqualification of the judge by reason of interest, however, is not raised by the question here presented.

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The reserved question is answered in the negative.

Harry Irwin for the guardian.

E. W. Sutton, Deputy Attorney General, amicus curiae.

DISSENTING OPINION OF PERRY, J.

The provision of the Organic Act as amended is that "no person shall sit as a judge * * * in any case in which he has been of counsel." The only question now before us is whether the order to the guardian to file an account is a part of the same case in which the appointment of guardian was made or is in itself a separate and distinct case. The ordinary meaning of the word "case" is a cause or suit in court. A proceeding in probate intended to secure protection for the property and person of a minor is ordinarily regarded as constituting in its entirety one case in which the appointment of the guardian is the first step, and the qualification of the appointee as guardian, the filing of an inventory, and the filing of accounts of receipts and expenditures on behalf of the ward are simply other steps. Ordinarily no attorney or judge would speak of these various steps as different cases. The title of the cause remains always the same. The ward and the guardian continue throughout as parties, and the subject matter, to wit, the custody of the person and the care of the property of the minor, is always the same. Subsequent proceedings may be instituted by mere motion,—without formal petition or service of summons, characteristics of the institution of new cases. The order in the present instance was even without motion, being of the judge's own accord. It seems to me that to regard the proceedings for the appointment of guardian as constituting in themselves one case and the order to account as the whole or a part of a separate case is to give the word, as used in section 84 of the Organic Act, a strained and unusual construction.

The mere fact that the order appointing a guardian was final so as to be appealable does not of itself show that the case was ended. Orders are sometimes appealable which are not the last

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in a cause. Appealable orders may even occur in the earliest stages of a cause. For example, in *Dole v. Gear*, 14 Haw. 554, a bill in equity for maintenance, an order of temporary maintenance, made at the inception of the case, before the trial of the main issue, was held appealable. In *Atcherley v. Jarrett*, 19 Haw. 511, an order denying a motion to quash levy was held to be appealable before the execution sale was had. In each of these two instances further steps in the same "case" were had or could have been had subsequent to the entry of the appealable orders.

The statement in 9 Haw. 356, *Estate of Banning*, by two of the justices, that "the estate in probate is not the 'cause,' the 'cause' meant in the statute is the exact case or issue brought to the Supreme Court by the appeal," would seem to have been obiter dictum, but if it is to be regarded as an authority upon the point now under consideration I think that it ought not to be followed.

It may be that in some cases this court in passing upon alleged causes of disqualification has given to the technical terms under consideration a narrower meaning than has been given to the same terms in other jurisdictions. However that may be, each case must be considered in view of its own circumstances and in each the attempt must be, as it undoubtedly has been, to give to the language of the act the meaning intended for it by the legislative body which enacted it. In this instance, within the meaning of the Organic Act, the judge below, in my opinion, acted as counsel in the same case in which the order in question was made and is therefore disqualified.

Territory v. Furubayashi, 20 Haw. 559.

TERRITORY OF HAWAII v. FURUBAYASHI.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 19, 1911.

DECIDED JUNE 26, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MUNICIPAL CORPORATIONS—*ordinance, title of.*

It is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent, void.

Sections 2, 3 and 4 of ordinance No. 6 of the City and County of Honolulu, held to be inoperative for the reason that the provisions therein contained for the registering, licensing and bonding of persons to do "any plumbing work" are not expressed in or suggested by the title of the ordinance.

OPINION OF THE COURT BY ROBERTSON, C.J.

The following charge was entered against the defendant in this case in the circuit court of the first judicial circuit: "That Furubayashi did, at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 12th day of May, A. D. 1910, unlawfully and wilfully do plumbing work on certain premises situate on Emma Street near Corkscrew Lane in said Honolulu, without having first registered at the office of the Plumbing Inspector of the City and County of Honolulu, contrary to the provisions of Ordinance Number 6 of the City and County of Honolulu, Territory of Hawaii."

To that charge the defendant demurred on several grounds, and the court reserved for our consideration the question, "Shall the demurrer of the said defendant to said complaint and charge be sustained?"

We deem it necessary to deal with one only of the several contentions urged by the defendant's counsel, namely, the contention that the provisions of the ordinance under which the

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defendant is being prosecuted are null and void because they constitute a subject which is not expressed or included in the title of the ordinance.

Section 15 of the act incorporating the city and county of Honolulu (Act 118, Laws of 1907) contains the provision which is, in substance, commonly prescribed throughout the United States with reference to statutes and municipal ordinances. It is as follows: "An ordinance shall embrace but one subject, which shall be expressed in its title. If any subject be embraced in an ordinance and not expressed in its title, such ordinance shall be void only as to so much thereof as is not expressed in its title."

The title of the ordinance in question is, "An ordinance providing for the appointment of a plumbing inspector of the city and county of Honolulu, prescribing the powers and duties of such plumbing inspector, establishing rules and regulations for the plumbing and drainage of buildings and the construction of house sewers in the city and county of Honolulu, and prescribing penalties for the violation of the provisions of the ordinance." The body of the ordinance, which comprises thirty-one sections, includes provisions which clearly fall within the several elements embraced in the title. The question is whether the second, third and fourth sections, at which the defendant's objection is directed, are within the purview of the title. Section 2 is, in full, as follows: "From and after the passage of this ordinance, it shall be unlawful for any person or persons, firm, or corporation to carry on the business of or do any plumbing work in the city and county of Honolulu, until he or they shall have first registered at the office of the Plumbing Inspector." Section 3 provides for the issuance of licenses to persons, firms and corporations registered under section 2 upon payment of an annual fee of ten dollars. Section 4 requires all applicants for a license to furnish a bond, with surety, in the sum of five hundred dollars conditioned to indemnify the municipality from all claims which may be made against it

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for or on account of any injury sustained by any person by or in consequence of any act of the licensee, his agents or servants, in or about the work permitted to be done by such license, or on account of any violation of the provisions of the ordinance, and to pay to the municipality any penalty recovered against the licensee for any violation of the ordinance.

It is well settled that it is sufficient if the title of a statute or an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead. Cognate subjects are not different subjects within the meaning of the rule, but an act which contains provisions neither expressed in or suggested by the title, nor germane or cognate to the subject expressed therein is, to that extent, vulnerable to objection. 26 Am. & Eng. Enc. Law (2nd ed.) 579, 589.

The language of the title is to be given a liberal interpretation, and the largest scope accorded to the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act. *Id.* 583. See also, *In re Walker*, 9 Haw. 171; *Republic v. Akau*, 11 Haw. 363; *Ahmi v. Buckle*, 17 Haw. 200.

The application of these rules, which has furnished a fruitful subject of litigation, is often attended with much difficulty. Comparing the provisions of sections 2, 3 and 4, of the ordinance in question with its title, we think it is clear that they are not properly referable to either the "appointment of a plumbing inspector," or his "powers and duties," or to "rules and regulations for the plumbing and drainage of buildings," or to "the construction of house sewers." Such broad provisions for the registering, licensing and bonding of persons who may desire to do "any plumbing work" have no reasonable connection with any element of the title. They constitute, rather, a separate and distinct scheme—one independent of that outlined by the title. Whether or not that scheme is sufficiently germane to that embraced in the other sections of the ordi-

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nance so that both might, under a sufficiently comprehensive title, be included in one act we need not say.

A statute or ordinance the title to which purports to be specific may be open to the objection that one of its provisions is not expressed in the title when the object might have been sufficiently expressed in general terms. The very attempt to be specific may, through the omission to mention an important feature of the act, result in the making of a misleading title. *Hyman v. Kapena*, 7 Haw. 76; *Marionaux v. Cutler* (Utah), 91 Pac. 355, 358; *Lamar Canal Co. v. Amity L. & I. Co.*, 26 Colo. 370, 374; *State v. Bradt*, 103 Tenn. 584; Cooley's Con. Lim. (6th ed.) 178.

We think that the omission to make the reference to the subject matter of the three sections referred to has caused the title of this ordinance to be misleading. We hold those sections to be inoperative.

It has been remarked that the adjudicated cases afford but little assistance to courts in passing upon questions of this character, other than in a general way, as each case must be decided according to its own peculiar facts. *Witzmann v. Southern R. Co.*, 131 Mo. 612, 618; *Power v. Kitching*, 10 N. Dak. 254, 258. The following cases may, however be referred to as illustrations of the application of the rule under circumstances somewhat analogous to those in the case at bar. *Payne v. School District*, 168 Pa. St. 389; *Marion Water Co. v. Marion*, 121 Ia. 306; *Carpenter v. Joiner* (Ala.), 44 So. 424; *Wade v. Atlantic Lumber Co.* (Fla.), 41 So. 72; *Henderson Bridge Co. v. Alves*, 122 Ky. 46; *Weimer v. Commissioners*, 124 Ky. 377; *Burcher v. People*, 41 Colo. 495; *State v. Merchant*, 48 Wash. 69.

The reserved question must be answered in the affirmative.

F. W. Milverton, Deputy City and County Attorney of Honolulu (*J. W. Cathcart*, City and County Attorney of Honolulu, with him on the brief), for plaintiff.

J. A. Magoon and *Noa W. Aluli* (*Magoon & Weaver* and *Noa W. Aluli* on the brief) for defendant.

Rodrigues v. Correia, 20 Haw. 563.

JOSE DOS PASSOS RODRIGUES v. FORTUNATO
CORREIA, VICTORINO de VASCONCELLOS AND
SOCIEDADE PORTUGUEZA de SANTO ANTONIO
BENEFICENTE de HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JUNE 23, 1911.

DECIDED JUNE 26, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

APPEAL AND ERROR—*appeal lies only from final order.*

An order quashing a summons in an equity case is not a final order, and an appeal therefrom which has not been allowed by the circuit judge cannot be maintained.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiff filed a bill in equity in the circuit court of the first judicial circuit entitled, properly, at chambers, in equity, praying for certain relief against the defendants, upon which process in the usual form in equity cases was issued and served upon two of the defendants and returned unserved as to one of them.

The defendants who had been served appeared specially and moved "that the summons heretofore and on, to wit, the 18th day of May, A. D. 1911, issued out of the above named court at chambers herein, be quashed and held at naught on the ground that said summons was issued by the clerk of this court without authority of law in this, that said summons was not issued under or pursuant to an order of a judge of this court at chambers, or on the order of the Honorable the Presiding Judge at Chambers."

After a hearing on the motion the circuit judge made an order that "the summons in the above entitled case issued out of this court at chambers herein be quashed and held at naught for the reasons stated in the motion." The plaintiff then brought an appeal from that order to this court, and the de-

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fendants now move to dismiss the appeal on the ground that the order appealed from was an interlocutory order and the appeal was not allowed by the circuit judge.

Under our statute (R. L. Sec. 1859) appeals may be allowed by the circuit judge in his discretion from interlocutory orders or decrees whenever he may think the same advisable for the more speedy termination of litigation.

The appeal in this case not having been allowed by the circuit judge, that statutory provision has no application. Plaintiff's right to maintain the appeal depends, therefore, upon whether the order can be regarded as a final one. A decree or order which is not final is not appealable. *Barthrop v. Kona Coffee Co.* 10 Haw. 398; *Atcherley v. Jarrett*, 19 Haw. 511, 513.

As appears by the order appealed from, the bill in this case was not dismissed; the summons, only, was quashed. Nothing appears in the record, and no reason has been suggested, to indicate that another summons may not issue upon its allowance by the circuit judge, if such allowance is necessary. The plaintiff did not, as we assume he might have done, inform the circuit judge that he elected to stand upon the original summons. Had that position been taken the judge could, and, doubtless, would, have dismissed the bill. But as the matter now stands the bill must be regarded as still pending. Plainly, therefore, there was no finality to the order appealed from. It was not an appealable order. This view has been taken in other jurisdictions in similar cases. *Winn v. Carter Dry Goods Co.*, 102 Ky. 370; *Lewis v. Barker*, 46 Neb. 662; *Honerine M. & M. Co. v. Tollerday S. P. & T. Co.*, 30 Utah 449; *Oland v. Agricultural Ins. Co.* (Md.), 14 Atl. 669.

The appeal is dismissed.

E. C. Peters and *A. D. Larnach* for the motion.

Eugene Murphy contra.

Kekoa v. Robinson, 20 Haw. 565.

KAPUAHOONANI KEKOA, KAMANA IONA, THOMAS IONA, CHARLES IONA AND MANUEL KUHIO v. MARK P. ROBINSON, CAROLINE J. ROBINSON, MARY E. FOSTER, VICTORIA WARD, BATHSHEBA M. ALLEN, MATILDA A. FOSTER, ANNIE JAEGER, LUCY McWAYNE, REBECCA ROBINSON AND A. N. CAMPBELL, TRUSTEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JUNE 13, 1911.

DECIDED JUNE 30, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRIAL—cross-examination—matter of defense—direction of verdict.

Evidence, in support of an affirmative defense, improperly admitted on cross-examination of one of plaintiff's witnesses during his case in chief cannot, at the close of the plaintiff's case, be made the basis of a directed verdict.

OPINION OF THE COURT BY DE BOLT, J.

This was a statutory action to quiet title to a parcel of land situate at the north corner of King and Liliha streets, in Honolulu, being a portion of the premises described in L. C. A. 6236, in which the plaintiffs claim an undivided one-eighteenth interest in fee simple as tenants in common with the defendants, the actual possession of the land, however, being in the defendants.

At the trial the plaintiffs called Mr. Mark P. Robinson, one of the defendants, as a witness, and having examined him in chief upon matters pertinent to the plaintiffs' case, the witness was then permitted, on cross-examination, over the objection of the plaintiffs, to testify concerning certain facts not involved in the subject of the examination in chief, which counsel for the defendants claimed, and the court below held, showed title by adverse possession in the defendants. This was error. Adverse possession is an affirmative defense and the defendants should not have been permitted to interject it into the plain-

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tiffs' case. 8 Ency. Pl. & Pr. 106, 107; *Goddard v. Creffield Mills*, 75 Fed. 818, 820; *McCrea v. Parsons*, 112 Fed. 917, 919; *Da Lee v. Blackburn*, 11 Kan. 150 (*190), 159 (*202). If, however, the case had been permitted to go to the jury on full proofs, or with that opportunity, the error, perhaps, would have been harmless. But instead of pursuing that course the defendants, at the close of the plaintiffs' case, moved for a directed verdict on the grounds, first, that it affirmatively appeared from the evidence adduced by the plaintiffs that the defendants had title by adverse possession; and, second, that the plaintiffs had failed to establish the fact that they had any interest in the land. The court granted the motion on the first ground stated and instructed the jury to return a verdict for the defendants, and a verdict was returned accordingly. The motion was without merit and should have been denied. The plaintiffs excepted to the ruling of the court in directing the verdict on the ground stated and on the further ground that the defendants had put on no evidence. They also excepted to the verdict. The plaintiffs bring the case here on exceptions.

It will be observed that we are not dealing with a case where the evidence has been improperly admitted out of its order on cross-examination and both parties thereafter having had the opportunity to present and submit all their evidence to the jury. In a case such as here alluded to, one in which the improper admission of the evidence had not resulted injuriously to the party objecting, the only question involved being merely that of the order of proof, there is no question but that the latitude allowed on cross-examination is largely a matter of discretion with the trial judge, and that the appellate court will not interfere unless that discretion has been oppressively abused. In the case at bar, the evidence was not only improperly admitted, but the court, declining to permit the case to go to the jury, directed a verdict for the defendants, thereby cutting off the plaintiffs' right as well as the opportunity to rebut the evidence of adverse possession brought out by the defendants on the

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cross-examination of Mr. Robinson. This was not only error, but it was prejudicial to the plaintiffs. They had the right to submit the question of adverse possession to the impartial consideration of the jury, unless the undisputed facts showed adverse possession in the defendants as matter of law. But the evidence which was claimed to show adverse possession having been admitted out of its proper order, it should not have been used as a basis for the directing of a verdict for the defendants. *Booth v. Beckley*, 11 Haw. 518, 521; *Ahmi v. Waller*, 15 Haw. 497, 501; *Hughes v. Westmoreland Coal Co.*, 104 Pa. St. 207, 213; *Sullivan v. R. R. Co.*, 175 Pa. St. 361, 365.

The exceptions to the granting of the motion and the ruling of the court in directing a verdict for the defendants, as well as the exception to the verdict, are sustained. In view of the conclusion reached on the exceptions discussed it will not be necessary to consider the other exceptions.

The verdict is set aside and the plaintiffs are granted a new trial.

T. M. Harrison (W. C. Achi with him on the brief) for plaintiffs.

E. C. Peters for defendants.

WILLIAM K. UUKU, A MINOR, BY HIS NEXT
FRIEND, WILLIAM UUKU, v. ELIZABETH KAIO
AND ROSE K. DESHA.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED JUNE 23, 1911.

DECIDED JULY 3, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TRIAL—*direction of verdict—conflicting evidence.*

The evidence being sufficient to support a finding that P. was full brother of the intestate, it was error to direct a verdict based on the theory that the two were half brothers.

Uuku v. Kaio, 20 Haw. 567.

APPEAL AND ERROR—grounds of affirmance—questions not raised below.

While a judgment may, under some circumstances, be affirmed upon a ground other than that which influenced the trial court, the general rule is that an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken; and such rule will be applied where the ground relied on in the appellate court to support a judgment otherwise erroneous involves a question of fact not fully developed at the trial to which the attention of neither the trial court nor opposing counsel was called.

DESCENT AND DISTRIBUTION—"Ancestors," under §2513, R. L.

The word "ancestor" in the proviso of section 2513, R. L., embraces all persons from whom a title by descent could be derived under any circumstances.

The ancestor from whom "the inheritance came" is the person from whom it *immediately* passed, and not the remote source of the gift.

Id.—deed from wife—kindred of half blood not excluded.

A., the wife of K., for a nominal consideration conveyed to M. certain land which M. thereupon conveyed to K., the intestate. M. and K. were not related to each other by blood or marriage. Held, that the alleged gift "came" to K. from M. and not from A. and that the children of P., a deceased half brother of K. and not of the blood of A., were not excluded by the provisions of section 2513, R. L., from inheriting the land of K.

OPINION OF THE COURT BY PERRY, J.

This is a statutory action to quiet title to certain parcels of land situate on the Island of Kauai. At the close of the plaintiff's case the defendants moved for a directed verdict and the motion was granted and the verdict accordingly rendered for the defendants. The exceptions are to the direction and to the verdict.

In limine the defendants moved to dismiss the bill of exceptions on two grounds. The first is that "it does not affirmatively appear by said bill of exceptions that the same was presented to or allowed by the judge trying the cause * * * within the time allowed by law * * * or any valid extension thereof." By a certificate endorsed by the trial judge, at the request of this court, on the bill of exceptions after the ar-

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gument of this motion, it appears that the bill was presented for allowance on May 3, 1911. The order allowing it was made on May 4, 1911. The time for presenting the bill of exceptions to the judge, if there was any valid extension for that purpose, expired on, but included, May 3, 1911. The first ground is, therefore, untenable. The allowance admittedly may be on a day subsequent to the expiration of the time for presentation of the bill.

The second ground is, in substance, that the order granting the extension of time related merely to the filing of the bill and not to its presentation. Upon the court directing the jury to render a verdict for the defendants, counsel for the plaintiff said: "I desire to ask for thirty days after the receipt of the transcript to make and file a bill of exceptions," to which the court replied, "It is so ordered." Upon the return of the verdict and the denial of a motion for a new trial the court again allowed counsel's request, stated in these words: "I want to ask for thirty days after the receipt of a copy of the transcript within which to file a bill of exceptions." Defendants' point is that the time granted was merely for *filing* and not for *presenting* the bill of exceptions and that the two are distinct matters, citing *Ii Estate v. Mele*, 14 Haw. 311, and *Booth v. Schnack*, 19 Haw. 659. To construe the order of the circuit judge as relating strictly to a mere filing would be to impute to him the purpose to grant to plaintiff time within which to perform a nugatory act. Where the word "filing" requires a strict technical construction it would undoubtedly not be deemed to include a presentation, but under the circumstances of this case there can be no doubt that it was used as meaning and including the presentation as well as the filing. The motion to dismiss was for these reasons denied.

At the trial the parties stipulated that the following should be regarded as facts: "That the plaintiff and the defendants both claim an interest in the lands described in plaintiff's complaint under the same source of title, to-wit, as heirs of Isaac

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H. Kahilina, deceased; that the defendants claim an interest in the lands described in plaintiff's complaint as the heirs of Isaac H. Kahilina, deceased, by descent from said Isaac H. Kahilina; and that all of the lands described in plaintiff's complaint were at and before the death of Isaac H. Kahilina owned by him in fee simple." The plaintiff introduced evidence tending to show, *inter alia*, that the plaintiff's mother, Ana, now deceased, was one of five or six children of Paulo, that Paulo was the son of Kenoi (w) by her first husband, Kamahuula, and that Kenoi, by her second husband, Kahilina Sr., had three children, Isaac Kahilina, the intestate referred to in the stipulation of facts, Kaukaha (k) and Kapeka (w). At the defendants' request the plaintiff further admitted that "the property set forth and described in the complaint came to Kahilina" (meaning Isaac Kahilina) "from his wife, Ana Kini, by deed." The motion for a directed verdict was based on the ground that "the plaintiff is prohibited from receiving any part of the estate of Kahilina by virtue of Section 2513 and from what we see in the 9th Hawaiian, page 393," the case thus referred to being one to the effect that a son may be the "ancestor" of his father within the meaning of R. L., section 2513, and that a father, in such an instance, is considered to be "of the blood" of his son. As reported in the transcript accompanying the bill of exceptions, the presiding judge's ruling granting the motion shows clearly that it was based entirely on the theory that Paulo was a half brother of Isaac, and that, therefore, under section 2513, neither he nor his heirs could inherit in view of the fact that the title came to Isaac "from his wife Ana Kini by deed," Paulo not being of the blood of Ana Kini.

Polikapu, a witness, testified on direct examination that Isaac Kahilina had "an elder brother" and that his name was Paulo, and also "a sister" named Kapeka. On cross-examination the following questions and answers occurred: "Q. Don't you know as a matter of fact that Paulo was a son of Kenoi by her first

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husband, Kamahuula? A. I have heard that. Q. In other words, that Paulo was a half brother instead of a full brother of Kahilina? A. That may be so. * * * Q. What did Kahilina tell you? A. He told me, 'This child, Paulo, has a different father.' * * * Q. And that is, in other words, that Paulo was a half brother of Isaac Kahilina? A. May be his half brother. Q. Well, isn't that what Kahilina told you? A. He didn't say in those words, but he told me that he had a different father. * * * Q. He told you that Paulo was a child of Kenoi and Kamahuula? A. That is what he told me." Another witness, Hana Scott, answering the question, "Do you know who Paulo's father was?" said, "Mohoula." On the other hand, in addition to the evidence above quoted, given by Polikapu in direct examination, from a third witness, Noa Kuiki, came the following testimony: "Q. Did you know a man by the name of Paulo? A. I do. Q. Do you know whether or not he was related to Kahilina? A. Isaac Kahilina himself told me that 'he is my brother.' Q. Do you know which was the elder of the two brothers—Paulo or Kaukaha? A. Kahilina told me Paulo was the oldest. Q. I will ask you if you ever had any conversation with Kahilina with reference to his immediate family in which he gave you the pedigree or the ages? A. Yes, I met Kahilina and we talked it over. Q. How did he mention it to you, the order that he gave you, of their ages? A. He told me it was Kaukaha, Paulo and also a sister. Q. And the sister's name? A. I don't know her name * * * (On cross-examination) Q. Who was Paulo's father? A. *Isaac told me Kahilina was his father.*" Kuiki's statement that Isaac told him that Kahilina was the father of Paulo was as definite as Polikapu's statement that Isaac had told him that Paulo was the child of Kamahuula, and as definite as Hana Scott's testimony that "Mohoula" was the father of Paulo. While the evidence as it stood was sufficient to support a finding that Paulo was a half brother of Isaac, it was also sufficient to support a finding that the two were full brothers. The issue of

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fact, consisting largely of a question of credibility of witnesses, should have been left to the jury. It is clear that if Paulo was a full brother of Isaac, section 2513 could have no application.

It is urged, however, in support of the instruction and the verdict that no evidence whatever was adduced tending to show that Paulo died prior to the institution of this action. An examination of the record does, indeed, show that there was no such evidence, and also that there was no evidence tending to show that the parents of Isaac Kahlina and his wife, Ana Kini, died before Isaac and that Isaac left no issue surviving him—all facts indispensable to the vesting of title in the present plaintiff, the son of Ana, the daughter of Paulo.

This failure of evidence cannot now be taken advantage of by the defendants. The motion and the instruction proceeded on the assumption that the fact was, or at least that there was a sufficiency of evidence to show it, that Paulo and the parents of Ana Kini died before Isaac and that the latter left no children—in short, that Paulo inherited as heir of Isaac unless section 2513 forbade it. The point was not mentioned in the trial court. It would be unfair to the plaintiff to permit it to be presented for the first time in this court. Had it been advanced at the trial the defect could have been cured by the introduction of other evidence. It may well be in this case, as in *Makekau v. Kane*, 20 Haw. 203, 211, that the facts were all such as to vest the title in the plaintiff, that they could easily have been proven to be so, that the defendants were well aware of them and that the omission to make objection at the trial was due to such knowledge. The rule that a correct judgment is not to be set aside merely because an incorrect reason was given for it does not apply to the case under consideration. "A theory of a case or an assumption of fact adopted by the trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken. * * * Appellate courts are especially careful to prevent injustice re-

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sulting from affirmations of a judgment upon a ground not presented to the trial court and which might have been overturned by additional evidence had attention been directed to it. * * * The doctrine" (that a just judgment which is warranted by the record and the facts will not be overturned because it was based on the wrong reason) "is not applied where the ground relied upon in the appellate court to support a judgment, otherwise erroneous, involves a question of fact, not fully developed at the trial, to which the attention of neither the trial court or opposing counsel was called and where the upholding of the judgment would probably result in a miscarriage of justice." *Baker v. Kaiser*, 126 Fed. 317, 319, 320. "A party cannot sit by and acquiesce in the law stated by the presiding judge, making no objection to an erroneous assumption of fact, or to an omission to refer to certain facts, and speculate on the chance of a favorable verdict on another issue and then successfully move for a new trial founded upon the alleged errors in the charge or upon the assumption or omission just referred to. Such objections should be made while there is still time to correct the error either by a modification of the charge or by the allowance of further evidence." *Makekau v. Kane*, supra. See also 2 Cyc. 660-662, 673, 675; *Peck v. Heinrich*, 167 U. S. 624, 629; *Smith v. Spaulding*, 40 Neb. 339, 342; *Traction Co. v. Behr*, 59 N. J. L. 477, 479; *Bond Co. v. Wolfe*, 60 Pac. 637, 640.

The fact that there was evidence that Paulo was a full brother of Isaac of itself requires that a new trial should be granted. Since, however, the question of the effect of the deed of Ana Kini on the transmission of the title to the heirs of Paulo, if the latter was the half brother of Isaac, seems certain to arise upon a new trial, we shall pass upon it.

The witness Kuiki testified, "I was present when I saw the deed made out from Kahilina, from Kahilina's wife, deeded it over to Mika, and from Mika to Isaac." Aside from this statement and the admission that "the property set forth and

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described in the complaint came to Kahilina from his wife, Ana Kini, by deed," there is absolutely no evidence concerning the execution or the terms of any conveyance, direct or indirect, from Ana Kini to her husband. The admission itself is obviously inexact, for neither before nor since the act of 1888 (R. L., Ch. 146) could a married woman convey to her husband. Perhaps the admission is to be regarded as meaning that the wife so conveyed to the husband in the usual manner by deed to a third party, the latter in turn conveying to the husband. There was no evidence tending to show the consideration for the deed, nor even that the conveyance related to the land in controversy. We shall assume, however, in favor of the defendants, as was assumed by the court and counsel at the trial, that it related to the land in controversy, was for a nominal consideration and was made with the assistance of Mika. Nevertheless, the heirs of the half blood, not of the blood of Ana Kini, would, in our opinion inherit.

Section 2513 reads as follows: "Kindred of the half blood. The kindred of the half blood shall inherit equally with those of the whole blood in the same degree; provided, however, that where the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, all those who are not of the blood of such ancestor shall be excluded from such inheritance." The person from whom the inheritance, devise or gift *immediately* came to the intestate, and not the remote source of the gift, is the one referred to in the proviso in such statutes as this. *Brower v. Hunt*, 18 Ohio St. 312, 313, 343; *Prickett v. Parker*, 3 Ohio St. 395, 396, 397; *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Patterson v. Lamson*, 45 Ohio St. 77, 86, 87; *Estate of Ehu*, 9 Haw. 393, 394. Without deciding whether gifts other than testamentary are within the contemplation of the statute, Mika, and not the wife, is the person from whom the alleged gift "came" in this instance. The law itself rendered the wife incapable of making such a gift by deed to her husband. It was for this reason that the deed was executed

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to Mika. He could, but she could not, transfer the title to Isaac. Isaac received it from him and not from her.

Mika, under the assumed facts, was not an "ancestor" of Isaac. He was an utter stranger in blood and relationship, from whom Isaac could not under any circumstances have inherited. The word "ancestor" embraces all persons from whom a title by descent could be derived under any circumstances. *Greenlee v. Davis*, 19 Ind. 60, 62; 3 Washburn, Real Property, 18; *Prickett v. Parker*, supra; *Brewster v. Benedict*, 14 Ohio 368, 385, 386; *Estate of Ehu*, supra. Not all "gifts," irrespective of their source, are referred to in the proviso, but only those that come from "some one of his ancestors." The words last quoted are an essential part of the provision and must be given effect. The statute cannot be read as though they were not there. That Ana Kini conveyed to Mika and Mika in turn to Isaac did not, therefore, prevent the children of a brother of the half blood, not of the blood of Ana Kini, from inheriting from Isaac Kahilina, the intestate.

The exceptions are sustained and a new trial granted.

W. B. Lymer (*Thompson & Wilder* with him on the brief) for plaintiff.

M. F. Prosser (*Kinney, Prosser, Anderson & Marx* on the brief) for defendants.

JAS. N. K. KEOLA, DEPUTY ASSESSOR AND COLLECTOR OF TAXES IN AND FOR THE DISTRICT OF WAILUKU, SECOND TAXATION DIVISION, TERRITORY OF HAWAII, v. MAUI AUTO CO., LTD., A CORPORATION.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED JUNE 26, 1911.

DECIDED JULY 6, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—*enforcing payment of tax unpaid when due.*

Where the amount of a tax is certain, and the liability of the

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tax-payer has become fixed, the tax being due and payable, an action of assumpsit for its recovery may be maintained under section 1269 of the Revised Laws, as amended by Act 89 of the Session Laws of 1905, though the tax has not become delinquent.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Perry, J., dissenting.)

In an action of assumpsit instituted on May 19, 1911, in the district court of Wailuku, County of Maui, the plaintiff claimed of the defendant the sum of \$125.75 for taxes, as follows: \$2.75, special income tax for 1910; \$101, specific tax on automobiles; \$11, personal property tax first semi-annual instalment for 1911; and \$11 personal property tax, second semi-annual instalment for 1911; also penalties for delinquency, interest and costs. Judgment was given for the plaintiff for the sum of \$130, which covered what was claimed with the exception of the item of \$11 for the second semi-annual instalment of the personal property tax for the current year. The plaintiff brings this appeal. The sole question is whether the plaintiff was entitled to recover the last mentioned item of \$11. The district magistrate took the view that, as, by the statute, the second instalment of the personal property tax would not become delinquent until November 15th, no action for its recovery could be maintained before the expiration of that date. On behalf of the plaintiff it is contended that a proper application of the statute required that the judgment should have included the disputed item.

Sections 1263, 1264, 1265, 1267 and 1269 of the Revised Laws, as amended by Act 89 of the Session Laws of 1905, contain the following provisions.

Sec. 1263. "Specific taxes and all property taxes shall be due and payable on and after January 31st, in each year."

Sec. 1264. "All real and personal property taxes—except specific taxes—remaining unpaid on May 15 of each year shall thereby and thereupon become delinquent as to one-half the

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amount due. And the balance of such real and personal property taxes remaining unpaid on November 15 of each year shall thereby and thereupon become delinquent."

Sec. 1265. "A penalty of 10 per cent shall be added by the assessor to the amount of all delinquent personal and property taxes, which penalty shall be and become a part of such tax and shall be collected as part of such tax. Any delinquent tax and penalty remaining unpaid fifteen days after the date of delinquency shall bear interest from the date of the expiration of said fifteen days at the rate of ten per cent per annum until paid, which interest shall be and become a part of such tax and shall be collected as part of such tax."

Sec. 1267. "Each assessor or his deputy shall, between January 31 and November 15, both inclusive of each year, for the convenience of tax payers, attend at certain times or places in each district for the collection of taxes.

"Public notice of the time or times, place or places of such attendance and the object thereof shall be given by advertisement in a weekly newspaper or newspapers, and by posting a notice of the same in at least three conspicuous places in each district. Such notice shall also contain a statement that all brake, sulky, ox-cart, automobile, bicycle, wagon, wagonette, hearse, omnibus, dray, cart and carriage taxes and one-half of all property taxes not paid on May 15 will be delinquent and subject to a penalty of ten per cent additional, and if not paid 15 days after delinquent interest from the date of expiration of said fifteen days shall be added at the rate of ten per cent per annum on such tax and penalty, and that the remaining portion of the property taxes due and not paid by November 15 will be delinquent and subject in like manner to a ten per cent penalty and ten per cent interest. And that the delinquent tax list will be published as soon after December 1 following as possible.

"Each tax payer shall pay all specific taxes and one-half of all property taxes due by him to the assessor or his deputy on

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or before May 15, and he shall pay the remaining portion of the property tax due by him to the assessor or his deputy on or before November 15 of the year in which they are assessed, and no other notification or demand than that in this chapter provided for shall be required or necessary."

Sec. 1269. "If any tax be unpaid when due, the assessor may proceed to enforce the payment of the same, with all penalties, as follows: 1. By distress * * * * *. 2. By suit or action in assumpsit, in his own name, on behalf of the Territory of Hawaii, for the amount of taxes and costs, or if such tax is delinquent for the amount of taxes, costs, penalties and interest, in any district court, irrespective of the amount claimed."

By other sections of the statute it is provided that all the tax-payers shall make returns of their property between the 1st and 31st of January, in each year; that the assessment books shall be made up on or before May 1st, and shall be open to inspection from the 1st to the 15th of May; that appeals from assessments may be filed between May 1st and 15th; and that the tax appeal court shall sit for the hearing of appeals between the 1st and 20th of June.

Standing alone and without reference to other sections, the provisions of sections 1263 and 1269 would make it clear that actions for the recovery of property taxes could be instituted at any time after January 31st of the year of their assessment.

Full effect must, if possible, be given to the explicit language of those sections.

It should be noted with reference to property taxes that the provision in section 1264 is not that one-half shall be due and payable on May 15, and that the remaining one-half shall be due and payable on November 15, but that, as stated in section 1263, the whole shall be due and payable on and after January 31st.

The right to maintain actions for the recovery of taxes is not affected by any of the provisions relating to delinquency

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or its consequences. And, we are satisfied, the provision contained in section 1267, that each tax payer "shall pay" his specific taxes and one-half of his property tax on or before May 15, and the remaining portion of his property tax on or before November 15, was not intended to nullify that portion of section 1269 which authorizes the bringing of suit for taxes before they have become delinquent. The mention of those two dates is only incidental to the main subject of that section, which is the giving of public notice regarding the payment of taxes and of the penalties for delinquency.

Notwithstanding the peremptory declaration of section 1263, that all property taxes shall be due and payable on and after January 31st, the provisions for taking appeals to the tax appeal court, which does not sit before June 1st, show that any tax that may be involved in such an appeal could not be the subject of an action of assumpsit until the appeal has been decided and the liability of the tax payer determined. Reconciling and giving effect to each of the provisions referred to, as we must do if we can, we should have to regard the provisions of sections 1263 and 1269 as subject by implication to the proviso that the amount of the tax has been definitely fixed either by the acceptance and approval by the assessor of the tax-payer's return, or by an assessment made in the absence of a return, or by the determination of a dispute by the tax appeal court. In the vast majority of cases, as in the case at bar, the liability of the tax-payer will have been determined on or before May 1st, and as to all such cases section 1269 may apply without any practical difficulty and according to the apparent intent of the legislature.

That actions for the recovery of taxes, ordinarily, are not brought before the taxes have become delinquent, or because there may be a general impression among the tax-payers that they cannot be forced to pay their taxes before the arrival of the respective delinquent dates, are not reasons for ignoring the legislative mandate.

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The legislature having, in plain terms, said that the assessor may bring suit to enforce payment "if any tax be unpaid when *due*," it is not for this court to say that what the legislature meant was that the assessor may proceed to enforce payment of a tax only when it has become *delinquent*. Good and sufficient reasons probaby may be found in the practical enforcement of the law to show why the assessor should not be compelled to wait until a personal property tax has become delinquent before bringing suit to compel its payment.

The appeal is sustained and the case is remanded to the district court of Wailuku with instructions to ~~include~~ in its judgment the item of \$11, the subject of this appeal.

E. W. Sutton, Deputy Attorney General, for the plaintiff.

DISSENTING OPINION OF PERRY, J.

Conceding that standing alone and without reference to other sections the provisions of sections 1263 and 1269 (as amended by Act 89, 1905) would make it clear that actions for the recovery of property taxes can be instituted at any time after January 31 of the year of their assessment, still, in view of other provisions of our statutes on taxation, actions for the recovery of the second half of property taxes may not, in my opinion, be brought before November 15 of the year of assessment. Section 1263 provides that "all poll, road and school taxes shall be due and payable on and after January 1 in each year," and that "specific taxes and all property taxes shall be due and payable on and after January 31 in each year." Section 1269 provides that if any tax be unpaid "when due" the assessor may enforce payment by action in assumpsit "for the amount of taxes and costs, or if such tax is delinquent, for the amount of taxes, costs, penalties and interest." Under these two sections, if standing alone, suit could be brought for poll, road and school taxes after January 1 and for specific and property taxes after January 31 *in all cases*. No exceptions are made expressly and none, as I think, by implication,

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in favor of any taxpayer or class of taxpayers. But the enforcement of the payment of taxes *in all cases*, immediately after the dates named, would be obviously impossible. In the first place other provisions grant to every taxpayer the right, as well as impose upon him the duty, to make returns of his taxable property at any time during the month of January; require of the assessor notice to the taxpayer of any raise in valuation "on or before" April 1; require that the tax books be open to the inspection of the taxpayers from May 1 to May 15; grant to the taxpayer, whose valuations have been increased, the absolute right to appeal "on or before" May 15; and permit hearings by the court of tax appeals during the period from June 1 to June 20, and not at any other time. In all instances in which increases in valuation have been made by the assessor (the right on the part of the assessor to make such increases would continue at least until April 1 of each year) the taxpayer's right to appeal continues, in spite of inaction on the part of the taxpayer, until May 15, and if appeal is taken a decision thereon cannot be had before June 1, and in most cases would not be rendered until some days later. In none of the appealed or appealable cases, therefore, would it be possible for the magistrate before whom action is brought to determine before May 15, at the earliest, the amount of the judgment to be rendered for the Territory.

Counsel for the Territory would surmount these difficulties by construing section 1269 as though it were subject to an exception in favor of all contested and contestable taxes. The reading of such an exception into the statute would, in my opinion, be judicial legislation. I find nothing in the statute to warrant it. If section 1263 means that property taxes become due on January 31, then the provision of section 1269 making them suable "when due" makes them suable immediately after January 31, and without exceptions. Section 1265 provides that "no tax payer shall be exempt from any delinquent penalties by reason of having made an appeal on his

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assessment; but no delinquent penalty shall attach to the tax on the actual amount in dispute until such appeal shall be finally decided." Here is a special provision with reference to appealed cases. None similar to it is to be found relating to suits for contested or contestable taxes. The mere fact that ordinarily appeals are not noted in the great majority of cases cannot, I think, affect the construction to be given to the language used.

In the second place, section 1267 provides that "each tax payer shall pay all specific taxes and one-half of all property taxes due by him to the assessor or his deputy on or before May 15 and he shall pay the remaining portion of the property tax due by him to the assessor or his deputy on or before November 15 of the year in which they are assessed." It is true that the section contains other provisions, but I am unable to regard the one here quoted as incidental only to the subject of public notice and of penalties. The title of the section as a whole is, "Public notice, time, place of collection." This would indicate that the time of collection is at least as important a subject of the section as public notice and the place of collection. The language used and its arrangement show, as I think, that the provision concerning time of payment is coordinate with the others and not incidental to any of them.

I construe the words "shall pay on or before" May 15 and November 15, respectively, as being equivalent to "shall have until" the dates named within which to pay. In other words, a payment on November 15 is as clearly a performance of the taxpayer's duty concerning the second half of the taxes as payment on May 15 or February 1 would be. The words "on or before" are clearly used in other sections in this sense. For example, in section 1243 the assessor is required "on or before" April 1 to give notice of increase of valuation; under section 1245 a dissatisfied taxpayer may appeal "on or before" May 15; and under section 1259 the deputies' lists are to be prepared "on or before" July 1. In view of the pro-

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vision of section 1267 as to the times of payment, may it not be that all that was intended to be stated in section 1263 was that it would be lawful for taxpayers to pay and for assessors to receive taxes on the dates there named (January 1 and January 31) and at any time thereafter? The word "payable" in that section is certainly capable of that construction, and the word "due" can be so read, as it seems to me, with less straining than is required in the construction contended for by the Territory of section 1269. In this view sections 1263, 1267 and 1269 would all be consistent. If, however, section 1263 is incapable of the construction just suggested and is necessarily inconsistent with section 1267, as I construe the latter, then I think that section 1263 must yield to section 1267. The latter is specifically upon the point, fixing, as I think, in clear and unambiguous language the length of time which a taxpayer may delay before paying his taxes. If the Territory's contention is adopted the taxpayer is told in section 1267 that he may have until May 15 within which to pay the first half of the property taxes and until November 15 within which to pay the second half, and in the same breath is told in sections 1263 and 1269 that the assessor may, at his option, compel him to pay as early as February 1. If the existing statutes do not sufficiently protect the Territory against debtors who, prior to the dates named, seek to remove their property from the jurisdiction, the remedy is for the legislature, not for this court, to provide.

In my opinion the judgment below was correct and should be affirmed.

Keola v. Landgraf, 20 Haw. 584.

JAS. N. K. KEOLA, DEPUTY ASSESSOR AND COLLECTOR OF TAXES IN AND FOR THE DISTRICT OF WAILUKU, SECOND TAXATION DIVISION, TERRITORY OF HAWAII, *v.* A. H. LANDGRAF.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

SUBMITTED JUNE 26, 1911.

DECIDED JULY 6, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—enforcing payment of tax unpaid when due.

Where the amount of a tax is certain, and the liability of the tax-payer has become fixed, the tax being due and payable, an action of assumpsit for its recovery may be maintained under section 1269 of the Revised Laws, as amended by Act 89 of the Session Laws of 1905, though the tax has not become delinquent.

OPINION OF THE COURT BY ROBERTSON, C.J.

(Perry, J., dissenting.)

This case is controlled by the decision in *Keola v. Maui Auto Co., Limited*, just rendered.

On May 25, 1911, the plaintiff brought an action of assumpsit against the defendant in the district court of Wailuku, County of Maui, claiming the sum of \$76.55, being the amount of income and property taxes assessed against the defendant for the year 1911. Judgment for plaintiff was given for the amount of the first semi-annual instalments of those taxes, which became delinquent on May 16th, together with the statutory penalties and costs. The plaintiff appeals and claims that the judgment should have included, as well, the amount of the second semi-annual instalments of such taxes.

The amount of the tax was not the subject of any dispute. The liability of the defendant had become fixed. The tax was due and payable, and the mere fact that a portion of it had not become delinquent did not constitute a bar to the recovery of such portion.

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The appeal is sustained and the case is remanded to the district court of Wailuku with instructions to enter a judgment which will include the amount of the second semi-annual instalments of the income and property taxes of the defendant as claimed by the plaintiff.

E. W. Sutton, Deputy Attorney General, for plaintiff.

MR. JUSTICE PERRY: I respectfully dissent, for the reasons stated in my opinion in *Keola v. Maui Auto Co., Limited*, supra.

JAMES CORNWELL, MARY KALEINOEHU CRAW-
FORD AND KAMAI KONA v. WAILUKU SUGAR
COMPANY, A CORPORATION.

ERROR TO CIRCUIT COURT, SECOND CIRCUIT.

SUBMITTED JULY 3, 1911.

DECIDED JULY 10, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—non-prejudicial error in excluding.

The exclusion of evidence, in an action of trespass, relating to the extent of the injury caused to the plaintiffs' property is not prejudicial when the jury finds for the defendant and has no occasion to consider the question of damages.

Id.—admissions against interest—adverse possession.

Admissions by an alleged adverse claimant of land to the effect that she was in possession by permission of the holder of the paper title are admissible to rebut the claim of adverse possession.

OPINION OF THE COURT BY PERRY, J.

This is an action for trespass, wherein the plaintiffs claim damages for injury alleged to have been caused by the defendant to a certain piece of land situate at Waikapu on the Island of Maui. The case was tried before a jury and a verdict rendered for the defendant. The plaintiffs make thirty-nine assignments of error.

The first is that James Cornwell, one of the plaintiffs, was

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not permitted the aid of an interpreter while giving his testimony at the trial. An examination of the transcript satisfies us that he was able to express himself with clearness in the English language and to understand the questions asked. No error was committed in denying the request for an interpreter.

Assignments Nos. 2 to 14, inclusive, relate to the disallowance of certain evidence concerning the value of taro patches and kuaunas destroyed by the defendant. This evidence was admissible, if at all, merely to aid the jury in determining the amount of damages to be awarded to the plaintiffs in case a verdict should be found in their favor. The main issue in the case was whether the title to the land was, at the time of the defendants acts complained of, in the plaintiffs or in the defendant. The verdict shows that this issue was decided in favor of the defendant, and that the question of the amount of damages was not at any time considered by the jury. The error, therefore, if any there was, in the exclusion of the evidence, was not prejudicial.

In assignment No. 15 the refusal of the court to permit an amendment to the declaration concerning the extent of the damages suffered by the plaintiffs in the destruction of certain kuaunas is complained of. For the reason just stated the error, if any, was not prejudicial.

Assignments Nos. 16 and 18. There was evidence tending to show that the plaintiffs James Cornwell and Kamai Kona were the children of Halewale (w), the daughter of Kapu Louzada, and that the plaintiff Mary Crawford was the daughter of Kakalina, who also was a child of Halewale. The plaintiffs' claim was under a deed from Kapu, executed in December, 1894, and was further that Kapu had had adverse possession of the land in controversy for more than the statutory period prior to the execution of the deed, and that after Kapu's death, in or about the year 1896, Halewale, on plaintiffs' behalf, continued to hold adversely against the whole world. One Friel, who had been in the employ of the Waikapu Sugar Co.,

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one of the defendant's predecessors in interest, and who had testified that in a certain year "everything went dry on account of a drouth that we had," and that during that year the water "kept the plantation cane alive," was asked, "Did Kapu make any claim of water for the land?" and the answer was that she had not. The admission of this evidence was not error. Plaintiffs' contention was that Kapu's possession was adverse to the Waikapu Sugar Co. as well as to others. It was certainly material to learn whether, during the period of drought, she had made any objection to the use of all the available water by the Waikapu Sugar Co. Another witness was asked to state "what Halewale said to you and what you said to Halewale relative to that land," the answer being, "I put the question to her, how she come to occupy the premises, and she said to me that she occupied the premises under W. H. Cornwell," likewise a predecessor in interest of the defendant. The defendant's claim at the trial was, in opposition to that of the plaintiffs, that Halewale, during the time that she was in possession, was holding, not under the plaintiffs, but under the defendant and with the latter's permission. Evidence of statements of Halewale that she was holding with the permission of the defendant's predecessors was certainly admissible.

Assignments Nos. 24 to 31, inclusive. These relate to the admission of certain deeds offered by the defendant as proof of its chain of title. The claim is that the deed from James Louzada to Henry Cornwell, dated October 1, 1864, "especially reserves from the operation thereof 'the property known as the Richardson premises, consisting of the dwelling house and 2½ acres of land, and being the same lands conveyed to him by the administrators of John Richardson,'" and that since Louzada "retained in himself title to the lands in question the defendant's exhibits Nos. 6 to 11, inclusive" (subsequent links in the chain of title), "had nothing to do with the question involved in this action." The land in controversy is described by metes and bounds in the amended declaration in

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this action, and is further described as containing 86-100 of an acre and as "being the same piece of land described in Apana 4, Grant or Patent No. 1673, by Kamehameha to John Richardson." Patent 1673 was introduced in evidence, the description of apana 4 corresponding precisely with that in the declaration save as to the area, which is given as "1.79 acres more or less," and the deed of the administrators of Richardson to James Louzada likewise describes one of the parcels by it conveyed precisely in the language of the description contained in the amended declaration. A deed by James Louzada to Henry Cornwell, dated August 18, 1864, conveys an undivided one-half interest in the land, the description by metes and bounds being given in the same language. A deed by Louzada to Henry Cornwell, dated October 1, 1864, conveys "all my estate, both real and personal, in Waikapu aforesaid, excepting therefrom" (here follows the exception as quoted above). Upon the face of the deed it does not appear that the excepted lot includes the land in controversy. The presumption would seem to be that it relates to a distinct parcel of land.

Assignment No. 32. Plaintiffs requested the court to instruct the jury "You are the judges of the measure of damages, if any, sustained by the plaintiff, if you find for the plaintiff, and you will determine the rule or rules governing the basis or grounds for determining such damages, and in this the court cannot give you rules of law to govern you," and the request was refused, the court giving instructions as to how the damages should be measured in the event of a verdict for the plaintiffs. Of this alleged error it is sufficient to say that it cannot now avail the plaintiffs, since the jury found that they were not entitled to recover any damages.

Assignment No. 33. At the defendant's request the jury was instructed that the defendant had "shown by the evidence a complete paper title to the land in dispute." The point made in support of this assignment appears to be that the deed from Louzada to Cornwell of October 1, 1864, did not purport to con-

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vey the land in controversy. This has already been disposed of above.

Of the remaining assignments some have been abandoned and the others are found to be without merit.

The judgment appealed from is affirmed.

J. Lightfoot for plaintiffs.

Kinney, Prosser, Anderson & Marx, for defendant.

CHARLES T. WILDER, ASSESSOR OF TAXES, *v.* HAWAIIAN TRUST COMPANY, LIMITED, TRUSTEE OF THE ESTATE OF GEORGE GALBRAITH, DECEASED.

SUBMISSION ON AGREED FACTS.

SUBMITTED JULY 14, 1911.

DECIDED JULY 17, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TAXATION—income tax—annuity from property held in trust.

Under chapter 99, R. L., the income tax on an annuity paid out of income derived from property held in trust is assessable against the annuitant, and not the trustee.

Id.—income tax on accumulations.

Surplus income arising from property held in trust and accumulating in the hands of the trustee pursuant to the terms of a will is not taxable under said chapter prior to the arrival of the time for its distribution.

OPINION OF THE COURT BY ROBERTSON, C.J.

This is a submission upon the following agreed statement:

"George Galbraith, a resident of Honolulu, died on November 5, 1904, leaving a will, a copy of which is hereto attached and made a part hereof, which was duly admitted to probate in the Circuit Court of the First Circuit, Territory of Hawaii. By the provisions of said will the residue of the estate after the payment of certain bequests, was transferred to the Hawaiian Trust Company, Limited, an Hawaiian corporation, in trust

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to pay from the income of the trust fund annuities to certain designated persons during their lives and upon the deaths of such annuitants to their respective heirs, the annuities to cease twenty-one years after the death of the last surviving specifically named annuitant, and upon the happening of that event the entire trust fund to be divided among the persons entitled at the time to the annuities. The surplus income after the payment of expenses and of the annuities was to be accumulated and distributed as part of the trust fund at the termination of the trust, as was decided in *Fitchie v. Brown*, 18 Haw. Rep. 52, the decision of the court in which case is hereby specifically referred to and made a part hereof.

"In the year 1910 the gross income received by the said Hawaiian Trust Company, Limited, which was and is the duly qualified and acting trustee under said will, as said trustee from the Estate was \$19,816.00. The expenses of management incurred in the earning of the gross income amounted to \$8,977.50, leaving a net income of \$10,838.50. from which there was paid to the various annuitants the sum of \$7,950.69, leaving a balance of surplus income amounting to \$2,887.81.

"The questions in dispute arising from the foregoing facts and submitted to this court for determination are as follows:

"Under the income tax law of the Territory of Hawaii, Sections 1278 and 1289, inclusive, of the Revised Laws, as amended by Act 87, Session Laws of 1905, and Acts 33, 64 and 66, Session Laws of 1909: (1) Is the trustee required to make return of and be taxed on the net income received by it from the Estate in excess of the expenses of management, or (2) May the trustee in addition to the expenses of management deduct (a) the amount paid to the annuitants (b) one or more deductions of \$1500, or (3) Is the surplus income after the payment of the expenses of management and of the annuities exempt so that the trustee need pay no income tax thereon? (4) Is the tax as to the amounts of income paid by the trustee to the annuitants assessable against them individually or against the trustee?"

The validity of the will of George Galbraith was attacked, but sustained in *Fitchie v. Brown*, 18 Haw. 52, the decree having been affirmed in 211 U. S. 321. By the will certain property was placed in the hands of the Hawaiian Trust Com-

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pany, Limited, as trustee "to devote sufficient of the annual income derived from the same toward paying" certain annuities. It appears from the statement of facts that the estate is producing more than enough income to pay the annuities and that a surplus is accumulating. In *Fitchie v. Brown* it was held that such accumulated surplus is not to be divided or paid out by the trustee until, when, at the termination of the trust, the corpus of the estate will be distributed. As by the terms of the will, the distribution is to be made between the heirs of persons now living, the persons who will then take are at present unknown. Out of the facts shown a controversy has arisen between the tax assessor and the trustee which involves the construction and application of certain provisions of the income tax law of this Territory.

Section 1278 of the Revised Laws, as amended, levies an annual tax of two per cent upon the income, over and above fifteen hundred dollars, derived by every person residing either within or without the Territory from all property owned and every business, trade, profession, employment or vocation carried on in the Territory. Under section 1280, as amended, such income shall include "money and the value of all personal property acquired by gift or inheritance." Section 1283 makes it the duty of all persons of lawful age having an income of one thousand dollars or more, from all sources, to render an annual return to the assessor of the amount of their respective incomes, and provides that "all guardians, trustees, executors, administrators, agents, receivers, and all corporations or persons acting in a fiduciary capacity, shall make or render a list or return as aforesaid to the assessor of the division in which such person or corporation, acting in a fiduciary capacity, resides or does business of the amount of income, gains and profits of any minor or person for whom they act." Section 1287 contains the provision that "all the powers, authorities, and duties contained or enacted by said chapter (Chap. 98, R. L., relating to personal and property taxes) for levying, assessing, collect-

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ing, receiving and enforcing payments of the tax imposed under the authority of said chapter and otherwise relating thereto shall be severally and respectively conferred, practiced and exercised for levying, assessing, collecting and receiving and enforcing payment of the tax imposed under the authority of this chapter, as far as the same shall not be superseded by, and shall be consistent with the express provisions of this chapter, as fully and effectually to all intents and purposes as if the same powers and authorities were repeated and re-enacted in the body of this chapter with reference to said tax."

On behalf of the assessor it is contended that the last quoted section has the effect of making a part of the income tax law the following provision contained in the personal and property tax law: "Every trustee, treasurer, executor, administrator or guardian shall make returns for taxation, and be assessed separately in respect of each property or trust which he represents, and shall be chargeable with the tax payable in respect thereof in the same manner as if such property were his own." (R. L. Sec. 1230.)

Counsel for the trustee state their claim to be that "the trustee is required by law to make an income tax return showing the amount paid by it as trustee to each of the annuitants and that the making and filing of this return is all that the income tax law requires of the trustee." The theory being that returns are required to be filed by persons acting in a fiduciary capacity in order, merely, to give the assessor information which otherwise it might be difficult to obtain.

Counsel for the assessor claims that "the trustee must make return of and be assessed upon the entire net income received, regardless of its disposition; or, in the event that this contention cannot be wholly sustained, then that the surplus annual income is taxable to the trustee, and as to the amounts paid to the annuitants that the assessments should be made to them individually."

These claims have been elaborately argued in the briefs of respective counsel.

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The trustee having admitted that it is required to make a return showing the amounts paid to each of the annuitants under the will, but two questions require to be determined, viz.: Are the taxes on the annuities assessable against the annuitants individually, or against the trustee? And, who, if any one, is to be assessed for the tax on the accumulated surplus income?

Bearing on both these questions is the contention of the assessor that section 1287 incorporates in the income tax act the provision of section 1230, above quoted. This contention is not sustained. So far as trustees are concerned, the provision of section 1230 is that they shall make returns, be assessed, and be charged with the taxes payable with respect to the several properties which they represent. The property tax act, looking at property as it exists on the annual assessment date, provides for the assessment of its value against the person who owns or holds the legal title. The law authorizes the assessor to demand and receive the amount of the tax from the trustee, who, in turn, as provided in section 1231, "may recover from any person in whose behalf he is compelled to pay any tax, the amount so paid by him," etc. The income tax act, on the other hand, looks to each individual, and provides that "every person" shall be assessed with respect to the income "derived" by him. The same income cannot be derived at the same time by two persons. But to sustain the contention of the assessor would result in the one income being assessed twice for the same year—to the trustee under section 1230, and to the ultimate recipient under section 1278. That that was not the intention of the legislature is very clear. In order to prevent such double taxing of the incomes received through the trustee by the annuitants under this will, it is suggested that the annuitants "may deduct from the amount of their gross annual incomes the amount of their annuities and be taxed on the balance over fifteen hundred dollars." But that would be doing something not authorized by the statute. Section 1281, which specifies what, in computing incomes, shall be deducted, does not in-

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clude moneys received from or through trustees. Furthermore, if the trustee should be assessed as a "person," as distinguished from a corporation, it would be entitled to deduct from the income the statutory exemption of fifteen hundred dollars, and if, according to the suggestion, each annuitant should also claim the exemption, the government would not get all it would be entitled to. Corporations are not allowed the exemption of fifteen hundred dollars, but, surely, whether or not an income received in trust is to be allowed the benefit of the exemption is not to depend on whether the trustee happens to be a natural or an artificial person. The further this line of argument is carried the more numerous are the difficulties encountered.

The provision of section 1230 is not consistent with either the general scheme of the income tax law or its express provisions. The section referred to must also be regarded as having been "superseded" by section 1283, which, referring to trustees, provides for their making returns, but does not provide for their being assessed. The omission, which, no doubt, was intentional, was necessary to avoid conflict with the provision of section 1287 requiring the direct assessment of all persons having taxable incomes.

From what has been said the answer to the first question we have put readily follows. The trustee is not to be assessed upon the income which it has collected and paid over to the annuitants. That income, though collected by the trustee, was not, within the meaning of the statute, *derived* by the trustee, but by the annuitants. The several annuitants, if they are required to render returns, should include their annuities in their returns as part of their respective incomes.

As to the surplus income, we hold that it is not taxable during the period in which it is to accumulate. As above pointed out, the statute levies the tax upon incomes "*derived*" by persons. The same term is used in section 1279 with reference to the tax upon the incomes of corporations. In section 1280 the words "*derived*," "*realized*" and "*acquired*" are used as

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synonyms. And in section 1281 the word "acquired" is used again in the same sense as "derived." These words refer to the receipt of income beneficially for the recipient's own use. One of the principal arguments advanced in favor of the principle of the income tax is that it tends to place the burden upon those best able to bear it and in proportion to their respective abilities to bear it. The argument assumes that persons in receipt of incomes beneficially, for their own use and to do what they will with, are able to contribute toward the support of the government according to the size of their incomes, but the argument would be unsound if it were intended to include as taxable income moneys received by one for the use and benefit of another.

The surplus income of the Galbraith estate, which, pursuant to the terms of the will, is being received by and is accumulating in the hands of the trustee, is not, and, so long as it thus accumulates, will not, within the meaning of the income tax law, be "derived" by any one. During the period of its accumulation no one will have the beneficial use of it or any part of it. It constitutes a fund which, although it may steadily increase, is not taxable income. Pending its distribution it is beyond the purview of the income tax act.

This ruling is in harmony with the decision in *Halstead v. Pratt*, 14 Haw. 38, where it was held that a gift under a will was taxable as of the time when the donee received it and not as of the date of the death of the testator. The word "acquired" was there held to mean "received" or "receivable."

Judgment will be entered in accordance with the views herein expressed.

E. W. Sutton, Deputy Attorney-General, for the assessor.
Kinney, Prosser, Anderson & Marx for the trustee.

Beckley v. Brown, 20 Haw. 596.

MARY BEATRICE CAMPBELL BECKLEY v. CECIL BROWN, HEINRICH MARTENS VON HOLT AND ALBERT NEWTON CAMPBELL, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF JAMES CAMPBELL, DECEASED.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED SEPTEMBER 18, 1911.

DECIDED SEPTEMBER 22, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

INFANTS—female infant—marriage of—disability.

Notwithstanding the marriage of a female infant her disability of minority continues until she attains the age of eighteen years.

OPINION OF THE COURT BY DE BOLT, J.

On August 10, 1911, the plaintiff filed her bill in equity for an accounting and distribution against defendants, trustees under the will of James Campbell, deceased, to which bill, on August 12, the defendants filed a plea in abatement alleging that the plaintiff "is not yet eighteen years of age and will only attain the age of seventeen years on the 12th day of October, 1911," and inasmuch as the proceedings were not brought on behalf of the plaintiff by a next friend or other representative legally entitled to act on her behalf, they pray judgment of the writ and bill, and that the same may be quashed. The record also shows that the allegations in the plea in abatement as to the age of the plaintiff are true, and that the plaintiff was legally married to George C. Beckley on August 1, 1911, "and is now his wife."

The circuit judge has reserved for the consideration of this court the question whether or not the plea in abatement is good in law and should be sustained. In other words, was the plaintiff's disability of minority removed by her marriage?

At common law the disability of minority of females, as well as males, continued until the age of twenty-one years. 16 Am. & Eng. Ency. Law, (2 ed.) 258, 262; 22 Cyc. 511, 517, 518;

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De Antonio v. Miller, 21 L. R. A. 699. Under section 2285, R. L., such disability as to females continues in this Territory until the age of eighteen years.

Section 2285 reads: "All male persons residing in this Territory, who shall have attained the age of twenty years, and all females who shall have attained the age of eighteen years, shall be regarded as of legal age and their period of minority to have ceased."

The language of the statute with regard to the attainment of legal age is general and applies alike to "all females," whether married or unmarried. There is no exception in favor of those who may marry before attaining the age of eighteen years.

If the disability of minority continues as to a female until she attains the age of eighteen years, notwithstanding her marriage before she arrives at that age, and we are clearly of the opinion that such disability does so continue, it follows necessarily that the plaintiff did not possess the necessary legal capacity to institute this suit and she cannot maintain it. This view accords with reason and authority. 10 Ency. Pl. & Pr., 594, 595; *O'Hara v. MacConnell*, 93 U. S. 150, 151; *In re Daggett*, 3 Pick. 280; *Wood v. Wood*, 2 Paige 108; *Alexander v. Davis*, 26 S. E. 291; *Clark v. Anderson*, 73 Ky. 99, 112; *Bool v. Mix*, 17 Wend. 119, 129, 130; *Schrader v. Decker*, 9 Pa. 14, 16; *Scranton v. Stewart*, 52 Ind. 68, 88, 91; *Sims v. Bardoner*, 86 Ind. 87; *Harrod v. Myers*, 21 Ark. 592; *Mackey v. Proctor*, 51 Ky. 433; *Porch v. Fries*, 18 N. J. Eq. 204.

Under section 2255, R. L., which provides that "a married woman may sue and be sued in the same manner as if she were sole," it is also urged that the plaintiff, by reason of her marriage, had the legal capacity to institute this suit. It will be observed, however, that the statute does not purport to change the capacity of the woman, but merely provides that she "may sue and be sued in the same manner as if she were sole." In this respect her capacity remains the same until otherwise changed. The plaintiff when "sole," by reason of her minority,

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did not possess the necessary legal capacity to bring this suit without a next friend or other proper representative. That incapacity remains, notwithstanding the marriage, and still she can "sue and be sued in the same manner as if she were sole." In other words, the statute removes the disability of coverture, but not that of infancy.

While it is true that section 2322, R. L., provides that "the marriage of any female who is under guardianship as a minor, shall operate as a legal discharge to her guardian" (*Ex parte Frank Pahia*, 15 Haw. 575), it by no means follows that such discharge of guardianship operates as a removal of the disability of minority.

The plea in abatement, in our opinion, is good in law and should be sustained. The question reserved, therefore, is answered in the affirmative.

G. A. Davis for plaintiff.

Holmes, Stanley & Olson for defendants.

VON HAMM-YOUNG CO., LTD., A CORPORATION, v.
MRS. W. WELSH.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED SEPTEMBER 18, 1911.

DECIDED SEPTEMBER 23, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PLEADING—*amendment*.

Plaintiff having mistaken the name of the defendant should have been allowed to amend by substituting the true name.

HUSBAND AND WIFE—*contract for necessities*.

A married woman may contract to pay for articles which are necessary.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the plaintiff on points of law from a judgment of the district magistrate of Honolulu in an action

Von Hamm-Young Co. v. Welsh, 20 Haw. 598.

of assumpsit brought by the plaintiff to recover the sum of \$44.84 for goods, wares and merchandise alleged to have been "sold and delivered to defendant at defendant's special instance and request."

The defendant pleaded in abatement of the action that summons was served on her as "Mrs. W. Welsh;" "that her true name is Katherine Keffer Welsh and she is the lawfully wedded wife of William Lawrence Welsh; that the account sued on in this proceeding is for necessities for herself and family and a debt of her husband."

The plaintiff moved to amend the summons and complaint by substituting the name of Katherine Keffer Welsh in place of "Mrs. W. Welsh."

The magistrate denied the motion to amend and sustained the plea in abatement, giving judgment for the defendant. These rulings constitute the points of law upon which the appeal comes to this court.

The motion to amend should have been granted. The proposed amendment was proper. Sec. 1738, R. L.; *Lum Sung v. Luning*, 13 Haw. 665.

The plea in abatement should not have been sustained. "The statute which authorizes a married woman to make contracts and to sue and be sued is not confined to contracts for purchases which are not necessities nor does it preclude her from contracting to pay for articles which the husband is bound to furnish. The right to make such contracts implies liability to be sued upon them." *Sachs Company v. Hart*, 19 Haw. 494, 495. The wife was capable of entering into the contract sued upon; whether she did or not was an issue of fact to be determined upon a hearing. But whether the issue should be raised by plea or answer we need not say at this time.

The judgment of the district magistrate is reversed and the case remanded.

E. C. Peters and *F. Schnack* for plaintiff.

Smithies v. Conkling, 20 Haw. 600.

G. E. SMITHIES *v.* D. L. CONKLING, TREASURER OF
THE TERRITORY OF HAWAII.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED SEPTEMBER 18, 1911.

DECIDED SEPTEMBER 27, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TERRITORIES—legislative power of.

A statute providing for the discharge of a moral obligation by means of an appropriation of public funds is rightful legislation within the meaning of the Organic Act.

STATUTES—construction of—restricted meaning.

Every reasonable view which may be taken of the language used in a statute should be resorted to in order to save the act from invalidity, and if it is capable of a restricted construction which would avoid conflict with the fundamental law that construction should be adopted.

SAME—office of title and preamble.

Neither the title of a statute, nor its preamble, may be used to control positive provisions in the body of the act, but may be resorted to where the language of the enactment is ambiguous and the intent doubtful.

SAME—enactment of—three readings.

Where a statute which originated in the house of representatives passed three readings in that branch of the legislature, and also in the senate where it was amended, it was not necessary, after the senate amendments had been concurred in by the house, to read the bill three times as amended.

SAME—doubt or uncertainty as to legislative intent.

Legislation is not to be nullified on the ground of uncertainty if it is susceptible of any reasonable construction that will support it.

SAME—appropriations—inadequacy of fund.

Under Act 143 of the Session Laws of 1911, claims should be paid in the order of their presentation till the fund is exhausted, the appropriation being insufficient to pay all the claims presented.

OPINION OF THE COURT BY ROBERTSON, C.J.

It appears from the agreed statement of facts in this case that during the period between June 14, 1900, and January 26, 1901, certain persons, firms and corporations (named in

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the statement) paid to the treasurer of the Territory sums aggregating the total of \$18,938.78 as and for annual merchandise license fees under and pursuant to the provisions of sections 1 to 7 and sections 75 to 79 of Act 64 of the Session Laws of 1896 (sections 690-696 and 764-768 of the Penal Laws, 1897) as amended by section 72 of the Organic Act; that pursuant to the provisions of Act 143 of the Session Laws of 1911, the plaintiff, as assignee of said persons, firms and corporations, on May 13 and 15, and June 1 and 20, 1911, presented to the defendant detailed statements, verified by oath, of the amount paid by each of them in accordance with the requirements of said act; that the defendant has verified such statements and is satisfied that none of the amounts so paid have been repaid to any one; that the plaintiff is ready and willing to file with the defendant proper receipts for said amounts upon payment thereof to him; that after June 20 and prior to July 1, 1911, certain other persons presented to the treasurer statements of the amounts aggregating \$8,677.47, paid by them between June 14, 1900, and January 26, 1901, to the then treasurer as and for merchandise license fees, and that no part of such amounts has been repaid; and that sundry other persons also, after June 20, 1911, and prior to July 1, 1911, presented to the defendant statements of the amounts, aggregating \$25,467.40, paid by them prior to June 14, 1900, to the then Minister of the Interior as and for like license fees under the aforesaid statute.

A controversy has arisen between the parties as to whether under the provisions of said Act 143 of the Laws of 1911 the defendant should pay the plaintiff the amounts claimed by him in full, in part, or at all.

The defendant attacks the validity of Act 143 on the following grounds: (1) That it conflicts with section forty-five of the Organic Act which requires that "each law shall embrace but one subject, which shall be expressed in its title;" (2) That it conflicts with section fifty-five of the Organic Act, in that it is not a "rightful subject of legislation;" (3) That it did not

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"pass three readings in each house," as required by section forty-six of the Organic Act. The defendant also contends that even if the act is not open to any of those objections it is impossible to carry out its provisions because the amount of money appropriated is insufficient to pay even the claims for the license fees paid to the treasurer subsequent to June 14, 1900, the date upon which the Organic Act took effect, which amount to the sum of \$27,616.25, and that, therefore, the act is inoperative.

Act 143 of the Laws of 1911 is as follows:

"An Act appropriating Twenty Thousand Dollars for the Purpose of Repaying Moneys Wrongfully Collected as Merchandise License Tax under Sections 764 to 768 of the Penal Laws of 1897.

"Whereas, certain persons, firms and corporations doing business in the Territory of Hawaii were required to and did pay into the Treasury of the Territory of Hawaii certain amounts as license tax imposed by Sections 764 to 768 of the Penal Laws of 1897, and

"Whereas, said Sections 764 to 768 of the Penal Laws were on January 26, 1901, declared by the Supreme Court of the Territory of Hawaii to be unconstitutional; Therefore,

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The sum of Twenty Thousand Dollars is hereby appropriated out of any money in the Treasury received from the general revenue, for the purpose of paying back the amounts collected as license tax under Sections 764 to 768 of the Penal Laws of 1897.

"Section 2. All persons, firms and corporations, or their executors, administrators, assignees or successors, as the case may be, shall within three months from the passage of this Act present to the Treasurer of the Territory of Hawaii, verified by oath, detailed statements of the amount or amounts paid by them in accordance with the requirements of Sections 764 to 768 of the Penal Laws of 1897, and the Treasurer of the Territory shall, after having verified such statements of the amounts so paid, and upon being satisfied that no part thereof has been repaid to such persons, firms or corporations, repay to such persons, firms or corporations, or their executors, administrators,

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assignees or successors as the case may be, the amounts paid by them, and shall obtain and file proper receipts for such payments.

"Section 3. In case such statement as is required by Section 2 of this Act shall not be made and presented on or before the 30th day of June, A. D. 1911, such claim shall be forever barred.

"Section 4. This Act shall take effect upon its approval."

The legislature passed the act over the governor's veto.

Certain provisions contained in a general license act passed by the Legislature of the Republic of Hawaii, known as Act 64 of the Session Laws of 1896, and which were incorporated in the Penal Laws, 1897 (Secs. 764-768), required the payment of an annual license fee "to sell imported goods, wares and merchandise." In the case of *Lansing v. Theo. H. Davies & Co.*, 13 Haw. 286, decided by this court on January 26, 1901, it was held that those provisions of the statute were in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and they must be regarded as having been void from and after the date of the extension to these Islands of the Federal Constitution by the Organic Act. During the interval the Territory had continued to collect the license fees as provided for in the statute referred to.

We will first consider the second objection to the validity of the act under review. In this connection the defendant contends that the statute is not a rightful subject of legislation because it constitutes an attempt to divert public funds to private use without any legal or moral obligation, or any consideration of public policy to support it; that this is particularly true as to the license fees collected before the license law came into conflict with the Constitution, and is also true as to the fees collected thereafter, because, as it is said, those who paid the tax received benefits to the amount of the tax by increased sales or increased prices, and by the elimination of competition from others, who, but for the necessity of paying the tax, might have engaged in business. It is also argued that even if the

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legislature could legally appropriate money for the repayment of the license fees collected after June 14, 1900, the present act cannot be allowed to stand because the appropriation is of a lump sum for the repayment of the license fees paid both before and since that date.

The contention is sound in so far as it relates to the inability of the legislature to legally make an appropriation for the refunding of such license fees as were collected before the license law became inoperative. It must be conceded that the legislature was without power to cause the repayment of those fees. We hold otherwise, however, as to the fees collected since June 14, 1900. Immediately upon the application to this Territory of the United States Constitution, persons had the right to import and sell merchandise without first obtaining a license so to do from the territorial treasurer. Those who paid the license tax after that date received nothing in return. Had they made the payments under protest they could have maintained actions to compel the return of their money. Under these circumstances there was ample ground for a finding, by the legislature, of a strong moral obligation on the part of the Territory to return the money thus illegally collected.

The point sought to be made that the act in question shows an intent to refund all license fees collected under the license law turns upon the proper construction to be given to the language of the act.

Unless the language of the statute is so positive and clear as not to permit of construction, it is our duty, in order to save the act from invalidity, to resort to every reasonable view which may be taken of the language used, and if it is capable of a restricted construction which would avoid conflict with the Organic Act that construction must be adopted. The presumption is that the legislature intended to do what it had a right to do and that it did not intend to do what it could not legally do.

While the title of a statute and its preamble are not, strictly speaking, parts of the statute, and though neither may be used

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to extend, restrain, or control positive provisions in the body of the act, they may be resorted to where the language of the enactment is ambiguous and the intent doubtful. 2 Lewis' Sutherland, Stat. Con. Secs. 339, 341; *In re Contested Election*, 15 Haw. 323, 331; *Beard v. Rowan*, 9 Pet. 301, 317; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 563; *Price v. Forrest*, 173 U. S. 410, 427; *Knoulton v. Moore*, 178 U. S. 41, 65. The ambiguity referred to is not merely that arising from the meaning of particular words, but such as may arise, in respect to the general scope and meaning of a statute, when all of its provisions are examined. *Coosaw Mining Co. v. South Carolina*, supra.

The broad language of the first section of the act is indefinite. It is capable of the construction placed on it by counsel for the defendant. But when read in the light of the title and preamble it shows that the intention of the legislature was to provide for the repayment of only such license fees, as, by reason of the decision of this court on January 26, 1901, must have been illegally, and therefore wrongfully, collected.

A statute providing for the discharge of a moral obligation by means of an appropriation of public funds is unquestionably "rightful legislation" within the meaning of the Organic Act.

The first objection raised against the statute, that its subject is not expressed in its title, is disposed of by the view we have taken of the second objection. Construing the body of the act as we hold it should be construed, there is no variance or inconsistency between body and title. The subject of the act is that which the title expresses.

The next point urged is that the act in question did not pass three readings in each branch of the legislature. This point is based on the contention that the original bill having passed the house of representatives, the title was amended in the senate without vote or action by the senate itself, and that after its amendment it was not read three times in the house upon its

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return there. Assuming that this court may examine the legislative journals to ascertain whether a statute did in fact pass three readings in each branch of the legislature as required by section 46 of the Organic Act, it will suffice to say that an examination of the senate journal does not sustain the contention made as to the amendment to the title of the bill in the senate. After the amendment of the bill and its return to the house, the amendments having been concurred in, it was not necessary to read the bill as so amended three times.

The final contention is that in any event the statute is impossible of execution and therefore inoperative and void. The argument is based on the fact that the sum appropriated is insufficient to pay all the claims in full, and there is no express provision in the statute providing for the contingency which has arisen. That all the claims should be paid in full would certainly be the proper construction to put upon the act if sufficient funds had been appropriated, notwithstanding that the act does not expressly so state. That no express provision was made for prorating the amount appropriated or for paying claims according to priority of presentment in the event of the appropriation being insufficient to pay all the claims is not, we think, sufficient reason for holding the act to be wholly inoperative. The statute does not say that the money shall not be disbursed, or that none of the claims shall be paid unless all are paid in full. The language of the statute is ambiguous. Construction becomes necessary. Legislation is not to be nullified on the ground of uncertainty if it is susceptible of any reasonable construction that will support it. Mere difficulty in ascertaining the meaning of a statute, or the fact that it is capable of different interpretations will not render it nugatory. 26 Am. & Eng. Enc. Law (2nd Ed.) 657; 1 Lewis' Sutherland, Stat. Con. Sec. 86. "In construing statutes the proper course is to start out and follow the true intent of the legislature and to adopt the sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects

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of the legislature." *Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 7.

The majority is unable to find in the language of the act any support for the view that it was intended by the legislature that in the event of the appropriation proving insufficient the claimants should be paid pro rata. To decree a distribution pro rata would, in their opinion, be judicial legislation. It is the intention of the legislature as made known by the language of the statute that must be sought and must prevail. The case is not free from difficulty; but, bearing in mind the rule that legislation is not to be nullified on the ground of uncertainty if it is susceptible of any reasonable construction that will support it, the majority is of the opinion that the act can be sustained upon the view that it directs payment of the claims in the order of their presentation until the appropriation is exhausted. The act was evidently passed in the belief that twenty thousand dollars would suffice for the reimbursement of all the claimants. Consistently with this belief the legislature, after authorizing all persons to present to the treasurer within a stated period of time detailed statements, verified by oath, of the amount paid by each under the unconstitutional license law, directed that "the treasurer of the Territory shall, after having verified such statements of the amounts so paid and upon being satisfied that no part thereof had been repaid to such persons, * * * repay to such persons * * * the amounts paid by them." The language thus used is capable of the construction that it became the duty of the treasurer to pay each claim upon its presentation, provided only that upon examination he found it to be correct and wholly unpaid. A direction for such payment upon presentation and in the order of presentation is what would naturally be expected of a legislature which desired to pay all the claims and believed that it was appropriating funds sufficient for the purpose. Distribution pro rata would necessarily involve a withholding of payment of every claim until the expiration of the prescribed period of limita-

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tion in order to ascertain the amount payable to each claimant. The language of the act is, in the opinion of the majority, incapable of the construction that any such delay or computation was thereby authorized or intended.

The writer believes that the general intent of the legislature would be best subserved by following the course which, in his judgment, fairness and justice would dictate, and that is by holding that the money appropriated should be distributed pro rata toward the payment of all the valid claims. Plaintiff's counsel, in their brief, admit that "there is nothing in the act indicating that claims are to be paid in the order of filing, and in fact a certain date is set up to which time apparently all claims filed were to be regarded equally. The legislature had the power to pay the claims in whole or in part, and not having appropriated sufficient money to pay all in full it follows that the intention must have been to pay them in part." And the general rule seems to be that claims of the same rank share ratably if the fund out of which they are to be paid is inadequate to satisfy all. 36 Cyc. 890; *State v. Burke*, 37 La. Ann. 434.

Judgment may be entered for the plaintiff for the full amount of his claims.

A. A. Wilder and A. L. C. Atkinson (*Thompson, Wilder, Watson & Lymer* and A. L. C. Atkinson on the brief) for plaintiff.

E. W. Sutton, *Deputy Attorney-General* (*Alexander Lindsay, Jr., Attorney-General*, with him on the brief) for defendant.

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KANEOHE RICE MILL CO., LTD., v. EDWARD MALAIHI HOLI (k), KAPAUHELANI (w), JOHN B. KUPAU HOLI (k), HARVEY HOLI (k), KAWAHINEAUKAI, HENRY HEAHI HOLI (k), MRS. ALE HOLI PRITCHARD, FRANK KAHALAU HOLI (k), AND D. NAOIWI (k).

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED SEPTEMBER 18, 1911.

DECIDED SEPTEMBER 27, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

PARTITION—trial of title.

A bill for partition cannot be made the means of trying a disputed legal title.

If, in a suit for partition, an issue is in good faith raised concerning the extent of the petitioner's interest in the land, the proper course is to suspend the bill and give the petitioner an opportunity to sue at law.

OPINION OF THE COURT BY PERRY, J.

In a bill in equity for partition the petitioner claims that F. W. Malaihi and Holi were the sons of Kahalua, the original patentee of the land sought to be partitioned, and that by mesne conveyances the interests of Malaihi and two of the eight children of Holi, an undivided five-eighths in all, passed to and are now in the petitioner, and also alleges that the respondent Naoiwi is the owner of an undivided three-eighths interest. Respondent Naoiwi answers denying that Malaihi was the son of Kahalua and claiming that Holi was the latter's only son and that from Holi's children an undivided one-fourth interest passed to the complainant and an undivided three-fourths interest to the respondent and that the ownership of the land is in the shares just stated and not otherwise. The circuit judge reserves for the consideration of this court the question whether the court of equity has "jurisdiction to determine in said suit for partition of said premises the extent or quantum of the in-

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terest respectively owned by said petitioner and by said respondent D. Naoiwi."

The general rule is well settled that "a court of equity does not interfere unless the title be clear and never where the title is" doubtful "until the party seeking a partition has had an opportunity to try his title at law." 4 Kent. Com., 365. If the contest concerning the title is not in good faith or presents equitable questions only equity, it seems, will decide all the issues. The general rule has been variously stated. "It is certain that courts of equity in assuming jurisdiction of the subject of partition always disclaimed the authority to determine doubtful questions in regard to the legal title." Freeman, Cotenancy and Partition, §502. "A bill for a partition cannot be made the means for trying a disputed title." Bispham's Equity, 535. "To entitle a plaintiff to a decree for partition he must show that his legal title is clear. * * * The doctrine almost universally held is that if the plaintiff's legal title is involved in doubt and is disputed and not established * * * the court will retain the bill to give the plaintiff a reasonable opportunity to establish his title at law, and when he has done that decree the partition according to his established right." *Nash v. Simpson*, 78 Me. 142, 150. "Courts of equity do not generally settle the conflicting titles of parties in their suits for partition. Hence, to entitle the plaintiffs to a decree for partition they must show a clear legal title." *Pierce v. Rollins*, 83 Me. 172, 177. "Such a proceeding" (to settle the title in a partition suit) "violates well settled principles and is against the practice of a court of chancery unless the dispute is in regard to an equitable title." *Chapin v. Sears*, 18 Fed. 814. "So far as general principles go we certainly could not reverse the decision of the court of appeals that the petitioners ought to establish their title at law before partition should be decreed. * * * 'A bill for partition cannot be made the means of trying a disputed title.'" *Clark v. Roller*, 199 U. S. 541, 545. See also *Wilkin v. Wilkin*, 1 Johns. Ch. 111, 117; *Gif-*

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fard v. Williams, L. R. 5 Ch. Ap. Cas. 546, 547; *Burt. v. Hell-yar*, L. R. 14 Eq. Cas. 160, 166; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Hay v. Estell*, 18 N. J. Eq. 251, 252; *Hardy v. Mills*, 35 Wis. 141, 146; *Deery v. McClintock*, 31 Wis. 195, 202, 203, and *Manners v. Manners*, 1 Green's Ch. (N. J.) 384, 385.

The plaintiff contends, however, that the rule does not apply to a case such as the one at bar where the respondent in his answer admits that plaintiff has some interest, raises an issue as to the quantum of that interest and claims for himself a larger interest than the plaintiff concedes to be his. Confining ourselves to the facts of the case,—a dispute concerning the relationship to the patentee of the persons under whom the parties claim, and recognizing that there are, perhaps, authorities to the contrary (*Agar v. Fairfax*, 17 Vesey, Jr. 533 and *West v. East Coast Cedar Co.* 101 Fed. 615, and 110 Fed. 725), we are unable to see any distinction in principle between this case and that of a denial of all of the plaintiff's title. The reasons which lead courts of equity to decline to exercise jurisdiction in the latter class of cases are of equal force in the former class. Those reasons are that questions, of fact at least, concerning the title to real estate are purely legal, appropriate to be determined by a court of law and that in their determination the parties are entitled to a trial by jury. Discussing the applicability of the Seventh Amendment to the Constitution of the United States that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," the supreme court of the United States has said that "where an action is merely for the recovery and possession of specific, real or personal property * * * the action is one at law," and that "in a contest over the title" to certain real property "both parties have a constitutional right to call for a jury." *Whithead v. Shattuck*, 138 U. S. 146, 151. "It has been repeatedly held that when one institutes partition proceedings and the defendant raises the issue as to whether the plaintiff is the owner of the premises in question,

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the issue thus raised is cognizable in a court of law and the parties are entitled to a trial by jury." *Gilbert v. Hopkins*, 171 Fed. 704, 707. "The proceedings in partition are not appropriate for a litigation between parties in respect to the title." *McCall v. Carpenter*, 18 How. (U. S.) 297, 302. "The jurisdiction in respect to titles of real estate is in courts of common law which courts of equity should hesitate to invade." *Kaaimanu v. Kauwa*, 3 Haw. 610, 612. "The claim of the plaintiff that she was entitled to an undivided half of this land was a claim of a legal nature and equity has no jurisdiction to determine it." *Kapuakela v. Iaea*, 9 Haw. 555, 556, 557. See also Ency. Law 1147; *Giffard v. Williams*, supra; *Morgan v. Mueller*, 107 Wis. 241, 244; *Kuala v. Kuapahi*, 15 Haw. 300, and *Ahin v. Opele*, 17 Haw. 525, 527. Even if, as is sometimes stated, there is not an inherent want of power in a court of equity to determine the issue of title provided the parties consent (*Bispham's Eq.* 535), that does not militate against this view. The exercise of jurisdiction in such cases is based upon a waiver by the parties of their right to a trial by jury. *Kuala v. Kuapahi*, supra.

In *Phelps v. Green*, 3 Johns. Ch. 302, cited by the plaintiff, the plaintiff's right to an undivided moiety was admitted by all concerned and the dispute was solely between the defendants as to the extent of their interests in the other moiety. It was ordered that the partition "be confined to the right of the plaintiff and to that of the defendants, considered aggregately; and that as to the conflicting claims between the defendants they ought to be settled at law before any further partition be made." Under similar circumstances practically the same course was followed in *Egner v. Meis*, 36 Atl. (N. J.) 943. These cases support our view of the law.

In *O'Hearn v. O'Hearn*, 58 L. R. A. 105, also cited by the plaintiff, the answer admitted "an absolute interest in the plaintiffs in the property, the amount or size of which depends upon the true construction of the will," and it was held that the court

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of equity had power to settle the controversy. That precise question is not before us.

The circuit judge is advised that the court of equity should not determine the issue of title involved and that if the parties so desire the bill should be retained for a reasonable time to allow the plaintiff an opportunity to establish its title at law.

A. A. Wilder (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

N. W. Aluli (*Magoon & Weaver* with him on the brief) for D. Naoiwi.

HENRY ST. JOHN NAHAOLELUA, GEORGE WILLIAM NAHAOLELUA, JOHN V. NAHAOLELUA, CHARLES K. NAHAOLELUA, ALBERT K. NAHAOLELUA, ALEXANDER K. NAHAOLELUA, ALICE K. NAHAOLELUA LANE, WIFE OF JOHN C. LANE, AND EMMA K. NAHAOLELUA v. H. A. HEEN.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED SEPTEMBER 25, 1911.

DECIDED SEPTEMBER 30, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DEEDS—*construction of, by parties.*

The rule that where the language of a deed is ambiguous and a certain construction has been given to it by the parties themselves, that construction will be accepted as the true one unless it contravenes some rule of law, does not apply unless all the parties interested participated in such construction.

ACTION TO QUIET TITLE—*title from common source—agreed facts.*

In a statutory action to quiet title where from the facts agreed upon it appears that both the plaintiffs and defendant claimed title from a common source it is not error to exclude evidence of title anterior to that source.

APPEAL AND ERROR—*exceptions in jury-waived cases.*

The statute requiring that the decision in a jury-waived case

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must be filed in writing, an exception to a so-called oral decision is ineffective for any purpose.

In a jury-waived case an exception to the judgment does not serve to bring up the merits of the decision.

In such a case an exception to the denial of a motion for a new trial which was made and passed on before a written decision was filed presents nothing for the consideration of the supreme court.

OPINION OF THE COURT BY ROBERTSON, C.J.

This case was previously before this court upon exceptions brought by the plaintiffs. Ante, p. 372. The exceptions having been sustained and a new trial ordered the case was brought on for trial in the court below. The plaintiffs obtained judgment, and the case has now come up upon defendant's exceptions. The essential facts were agreed upon, but the stipulation expressly allowed the offering of additional facts in evidence. Upon the new trial the defendant offered in evidence certain documentary evidence for the purpose, as it was stated, of showing contemporaneous construction on the part of Elizabeth Kahele Nahaolelua as to her title to the property in dispute and as to the effect of the deed of September 13, 1873 (which is set forth in the previous decision of this court), and for the further purpose of showing adverse possession on the part of the defendant. Upon plaintiffs' objections the evidence was rejected.

Exceptions 1 to 8, except 2, relate to the court's rulings upon the evidence so offered. That evidence consisted of portions of the court records in the cases of *Kalaeokekoi v. Kahele et al* (Eq. 191); *same v. same* (Law 2388), and *E. K. Nahaolelua and Kia Nahaolelua, her husband, v. Kaaahu et al* (Eq. 712), also two mortgages and eleven deeds executed by Elizabeth K. Nahaolelua and her husband, all of which, it is claimed, relate to the property conveyed by the deed of September 13, 1873, a portion of which is involved in this case. In some of those conveyances the title was warranted; in most of them it was not. Defendant's counsel contend that the evidence offered

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tended to show, by way of contemporaneous construction of the deed from A. S. Cleghorn and P. Nahaolelua, trustees, to the mother of the plaintiffs, the understanding on her part that the undivided one-half of the land was thereby conveyed to her in fee simple, and that after the execution of that deed she claimed to own the fee simple title to the land and dealt with it as her own. The evidence was properly rejected. We concede the existence of a general rule of construction to the effect that where the language of a deed is doubtful or ambiguous and a certain construction has been given to it by the parties themselves, as shown by their conduct or admissions, that construction will be accepted as the true one unless it contravenes some rule of law. See 13 Cyc. 603. But in order that the rule may apply in a given case it must appear that the particular construction was participated in by all the parties in interest. In *Dakin v. Savage*, 172 Mass. 23, 27, the rule was stated thus: "In a case of difficulty depending on nice and not very well defined distinctions, where all the parties legally and equitably interested have acted upon a particular construction of a deed or deeds, it is wise to follow that construction unless it is forbidden by some positive rule of law." In *Cincinnati v. Gas Light and Coke Co.*, 53 Oh. St. 278, 286, the court said: "To have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties."

In the case at bar the plaintiffs were not parties to any of the transactions sought to be put in evidence. It cannot be said, therefore, in this case, that all the parties in interest participated in the alleged contemporaneous construction without holding that the plaintiffs took no interest in the deed in question. We cannot so hold without deciding the very point in controversy. It is clear that under such circumstances the rule referred to has no application.

Exception 2 relates to the refusal of the court to admit in evidence, upon defendant's offer, the original award and patent

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covering the land in dispute. An objection was made to the materiality of the evidence on the ground that the agreed facts showed that the plaintiffs and defendant claimed title from a common source. The title beyond that source not being involved the evidence was properly rejected. *McCandless v. Honolulu Plantation Co.*, 19 Haw. 239.

Exceptions 9, 10 and 11. The parties having rested, the court orally ruled that the plaintiffs should take judgment. The defendant excepted to the ruling and gave notice of a motion for a new trial, which motion was afterwards filed and was denied. Subsequently, the court filed a written decision in the case holding that judgment should be entered for the plaintiffs with costs against the defendant, and judgment was, accordingly, entered. The defendant excepted to the judgment but did not except to the decision. Upon this state of facts counsel for plaintiffs contend that there is no exception now before the court upon which counsel may properly argue, as they have done, the question of the construction of the deed of September 13, 1873. The rule of "the law of the case" is also invoked, but it will not be necessary to consider it. We hold that the question of the construction of the deed, in the absence of an exception to the decision of the court below, is not now before us. The oral ruling of the court that the plaintiffs were entitled to take judgment cannot be considered as anything more than an intimation by the court as to what its decision would be. In jury waived cases the decision of the court must be filed in writing. R. L. Sec. 1747; Act 117, Laws of 1909. And an exception to a so-called oral decision is ineffective for any purpose. *Maalo v. Kaiapa*, 11 Haw. 705. The exception to the overruling of defendant's motion for a new trial was also abortive for the reason that at the time the motion was made and passed on no written decision had been filed. The exception to the judgment would be effective to present any question as to its form, had such been raised, but it did not serve to bring up the merits of the decision. The decision in

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a case tried without a jury is analogous to the verdict in a case tried with a jury, and an objection that a decision was contrary to the law or the evidence can be made in this court only when an exception to the decision has been noted in the trial court. See *Thatcher v. Ireland*, 77 Ind. 486.

This court has heretofore decided that exceptions taken during the progress of a trial and perfected according to the statute will be considered though there was no exception to the verdict. *Okuu v. Kaiaikawaha*, 7 Haw. 311. Also, that exceptions properly brought up will be considered though they are incorporated in a bill containing other exceptions which cannot be considered. *Ferreira v. Rapid Transit Co.*, 16 Haw. 406; *Kauhane v. Laa*, 19 Haw. 526.

Having considered all the exceptions now properly before us and having found them to be without merit, they are overruled.

E. M. Watson (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiffs.

J. A. Magoon and L. P. Scott (*Kinney, Prosser, Anderson & Marx, Magoon & Weaver* and *N. W. Aluli* on the brief) for defendant.

WILLIAM W. BRUNER r. C. BREWER & COMPANY,
LIMITED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 2, 1911.

DECIDED OCTOBER 3, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGES—*disqualification—pecuniary interest.*

Under Section 84 of the Organic Act as amended by the Act of Congress of May 27, 1910, a justice is not disqualified from sitting in a cause in which a corporation is a party by the fact of a relative by affinity or consanguinity within the third degree holding shares of stock in the corporation, the justice having no

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pecuniary interest in the issue of the cause either directly or through such relative.

Id.—*disqualification—appeal from order made by one of the justices.*

Under the same section as so amended a justice who while judge of a circuit court made an order which is attacked on appeal on the ground of lack of jurisdiction is disqualified to participate in the hearing of the appeal even though the order was interlocutory and was based on a stipulation of the parties.

OPINION OF THE COURT BY PERRY, J.

The defendant suggests that the chief justice is disqualified from sitting in this case owing to the fact that his mother and his brother own shares of stock in the defendant corporation. Section 84 of the Organic Act, as amended by the Act of Congress of May 27, 1910, providing that "no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror has, either directly or through such relative, any pecuniary interest," is relied upon in support of the suggestion. The precise point of law involved was considered and determined in *Ewa Plantation Co. v. Holt*, 18 Haw. 509, the conclusion of the court being that "by the terms of Sec. 84 Org. Act a justice is not disqualified from sitting in a cause in which a corporation is a party by the fact of a relative by affinity or consanguinity within the third degree holding shares of stock in the corporation, the justice having no pecuniary interest in the issue of the case either directly or through such relative." In the present instance, likewise, the chief justice has no pecuniary interest in the issue of the case either directly or through the relatives mentioned.

In an affidavit filed by the defendant it is intimated that the "estate of G. M. Robertson" (referring to the father, now deceased, of the chief justice) is the owner of certain shares of stock in the defendant corporation and that for this additional reason the chief justice is disqualified. The chief justice informs the court and we find that his father's estate does not own any of the stock referred to.

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Upon Mr. Justice DeBolt's suggestion another question of disqualification is considered. The facts are these: The original case was an action of assumpsit. After the filing of the answer and before trial the parties entered into an agreement to settle by arbitration the issues raised under the pleadings and filed in the cause a stipulation to that effect, naming at the same time the three persons who were to serve as arbitrators and making certain provisions concerning the presentation of the matter to the arbitrators. In pursuance of the agreement and without hearing argument Mr. Justice DeBolt, who was then a judge of the circuit court of the first circuit, made an order referring the issues to the arbitrators in accordance with the terms of the stipulation. Final judgment, based on the award of the arbitrators, was entered by another judge of the circuit. The present writ of error is directed, as required by law, to the final judgment, but one of the assignments is that the trial court erred in making the order of reference "for the reason that there was no jurisdiction in said court or in said judge to make the same."

Section 84 of the Organic Act, as amended by the act of 1910, provides that no person shall sit as a judge "on an appeal from any decision or judgment rendered by him." The word "appeal," it is obvious, is used in a general sense. A writ of error is an appeal within the meaning of the statute. So, also, the order of reference is none the less a "decision" merely because it was interlocutory. To hold otherwise would be to render the provision nugatory in many instances where the reason for its enactment exists as clearly as it does in the case of final judgments. Nor does the fact that the order was based upon the stipulation and was granted without hearing argument, render the statute inapplicable. The making of the order necessarily involved a ruling by the judge to the effect that he had jurisdiction to make it, otherwise it would have been denied in spite of the agreement of the parties. The application of the statute cannot in such cases be made to depend upon the

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extent of the examination or the degree of thought bestowed by the judge upon the questions involved.

In our opinion, under the existing facts the statute does not disqualify the chief justice but does disqualify Mr. Justice DeBolt.

C. W. Ashford for plaintiff.

R. B. Anderson for defendant.

KIPAHULU SUGAR COMPANY, A CORPORATION,
v. JONA KANAE NAKILA.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED OCTOBER 2, 1911.

DECIDED OCTOBER 4, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MORTGAGES—*foreclosure of—statute of limitations.*

Foreclosure of a mortgage is not barred merely because the statute of limitations has run against the note for which the mortgage was given as security.

SAME—*deficiency judgment.*

The decree in a suit to foreclose a mortgage may not provide for entry of a deficiency judgment against the defendant when action on the note secured by the mortgage has been barred by limitation.

OPINION OF THE COURT BY ROBERTSON, C.J.

In a bill in equity to foreclose a mortgage filed in the circuit court of the first circuit, at chambers, it was alleged that on the 24th day of June, 1901, the defendant was indebted to plaintiff's assignor in the sum of two hundred and fifty dollars, and by reason thereof delivered his promissory note for said sum payable three years after date, secured by mortgage on certain land situated on the Island of Maui; that the interest on said note had been paid up to and including the 24th day of December, 1902; that the interest since that date and

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the principal of the note are unpaid. In his answer, the defendant admitted those allegations, but alleged that "said note mentioned in said mortgage is more than six years past due and no interest thereon has been paid in more than six years previous to filing of said bill by plaintiff, and that in consequence of failure of the plaintiff to bring an action for the recovery of said note within the period of six years from the date when said note and interest thereon was due, plaintiff cannot have or maintain its aforesaid action against this defendant, and that said mortgage, being security for said claim which is not enforceable against him, said defendant, is of no effect."

The plaintiff then moved for "judgment on the pleadings."

The circuit judge granted the motion and entered a decree foreclosing the mortgage. The decree directed the sale of the mortgaged premises at public auction; appointed a commissioner to make the sale; provided for the disposition of the proceeds of sale, and provided also that in the event of such proceeds being insufficient to satisfy the debt, costs, and expenses, the plaintiff should have "a deficiency judgment for any unsatisfied balance due in the premises."

From that decree the defendant brings this appeal.

The question at issue is whether the mortgage was extinguished or barred by reason of the fact that the statute of limitations had run against the note.

The plaintiff relies upon certain decisions of this court which, it is claimed, have settled the question in this jurisdiction. The principal case cited is that of *Hilo v. Liliuokalani*, 15 Haw. 507. The defendant contends that that case should be overruled, and he cites cases from other jurisdictions which hold that where the note is barred by the statute of limitations no recourse can be had against the security. In *Hilo v. Liliuokalani*, a bill for an injunction against the foreclosure of two mortgages was sustained, but the court there said: "Actions on the notes were of course barred long ago by the statute. there having been nothing to take them out of the statute or keep them

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alive. But that did not bar the remedy against the land. See *Campbell v. Kamaioipili*, 3 Haw. 477; *Kaikainahaole v. Allen*, 14 Haw. 527. The remedy at law against the land, however, would be barred by the period applicable to real actions," etc. The principle was approved in the later cases of *Castle v. Smith*, 17 Haw. 32, 36; *Maile v. Carter*, id. 49, 52; and *Warren v. Nahea*, 19 Haw. 382. This is also the doctrine of many of the state courts. See 2 Jones on Mortgages (5th ed.), Sec. 1204, note.

The statute that applies, in equity, by analogy, is that which limits the time within which a right of entry upon lands may be enforced. A presumption of payment arises from the adverse possession of the mortgagor for the period prescribed by that statute. 2 Jones on Mortgages (5th ed.), Sec. 1192 et seq. *Hilo v. Liliuokalani*, supra.

In the case at bar the statute has run against the note, but the period prescribed for the recovery of land has not expired. The plaintiff was, therefore, entitled to a decree of foreclosure.

The decree entered, however, was erroneous in that it provided for the entry of a deficiency judgment against the defendant in case the proceeds of sale should prove insufficient to satisfy the plaintiff's claim in full. *Phelan v. Fitzpatrick*, 84 Wis. 240, 250. To allow a deficiency judgment would virtually be to enforce payment of the defendant's note, action upon which is, concededly, barred. For this reason the decree must be reversed. The case is remanded to the circuit judge in order that the decree may be modified in accordance with this opinion.

Thompson, Wilder, Watson & Lymer for plaintiff.

Lorin Andrews for defendant.

OCTOBER, 1911.

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FRANK AKI v. MARY AKI.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 2, 1911.

DECIDED OCTOBER 7, 1911,

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

JUDGMENT—*void decree may be set aside.*

A decree of divorce rendered by a circuit judge without having acquired jurisdiction of the person of the libellee is void and may be set aside and vacated under the circumstances in this case.

PROCESS—*service—acceptance of.*

An attorney for a party in one case has no authority to accept service of process for the party in another case in which he is not attorney for the party and has not been specially authorized to accept service.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal from an order of a circuit judge vacating and setting aside a decree of divorce granted to the libellant on the ground of alleged adultery of the libellee.

The libel for divorce was filed June 7, 1911, and on the same day attorney H. G. Spencer, assuming to act for the libellee, endorsed on the summons the following: "Service of a copy of the within libel is hereby accepted. H. G. Spencer, atty. for Mary Aki." Upon this record, on July 8, the libellant being present in court, but there being no appearance by or on behalf of the libellee, the circuit judge proceeded to a hearing and granted the decree in question.

On July 14, the libellee filed her motion to vacate and set aside the decree on the ground that the circuit judge was without jurisdiction to proceed to a hearing and decree for the reason that she had not been served with process and that she had not appeared in the suit.

The libellee, in support of the motion, filed her affidavit, which, in substance, so far as it pertains to the question now before the court, is, that having begun a suit against her hus-

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band, the libellant, for separation, which suit was pending before the circuit judge on June 7, 1911, she, together with H. G. Spencer, who was then her attorney, had occasion to attend before the circuit judge on the date just mentioned concerning a matter of temporary alimony involved in that suit, and while they were in or near the courtroom of the circuit judge, Spencer was handed a certain paper document, the nature of which he did not then or at any time explain to her; that Spencer was not authorized by her to accept service of process in the present suit, nor was he at any time her attorney in this suit.

The libellant, in opposition to the motion, filed the affidavits of H. G. Spencer and J. Alfred Magoon. The affidavit of Mr. Spencer, in substance, is that he was present in the courtroom of the circuit judge on June 7, 1911, and that he was then and there acting as the attorney for Mary Aki in her suit for separation from her husband; that she was then present in the courtroom and sitting beside affiant at one of the tables provided for attorneys; that at the same time and place J. Alfred Magoon stated in open court, in the hearing of Mary Aki, that he had filed a libel for divorce on behalf of Frank Aki against Mary Aki on the ground of adultery with a Chinese; that then and there a certified copy of the summons and libel attached was served on Mary Aki by placing the same in front of her on the table; that affiant picked up the libel from the table, glanced it over and said to her that it was a suit for divorce by her husband against her and that the suit would come up for hearing in thirty days from that date, and thereupon, in her presence, and on her behalf, affiant accepted service of said summons and libel; that she was fully aware of the nature of the suit for divorce, and all that affiant did was with her full knowledge, sanction and approval.

The affidavit of Mr. Magoon is, in substance, that on June 7, 1911, he filed a libel for divorce in the circuit court of the first circuit on behalf of the libellant, against the libellee; that at the time the libellee was in the courtroom of the circuit judge

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and it was suggested in the hearing of the libellee that the cost of service could be saved if summons should be delivered to the libellee and she accept service; that the libellee was then sitting at one of the attorneys' tables in the courtroom and summons was delivered to her by placing the same in front of her on the table; that then and there the attorney for Mary Aki, H. G. Spencer, took up the summons and libel and glanced it over and spoke to her; that thereupon Spencer wrote on the summons acceptance of service.

The libellee, in reply to the affidavits of Messrs. Spencer and Magoon, filed an affidavit, in substance, that it is not true that she was sitting at a table provided for attorneys in the courtroom on the occasion mentioned; that it is not true that any paper or document, whether the same was a copy of the libel and summons herein or otherwise, was then and there, or at all, upon the date mentioned, laid upon the table in front of or in the immediate presence or within the observation of affiant, either with the intention of thereby making service thereof on affiant or of otherwise calling or bringing said document to affiant's attention; that it is not true that Spencer picked up or took up said document from said table in the presence, or within the observation, of affiant; that it is not true that Spencer, having so taken up and examined said document, informed this affiant that the same was a summons or libel or any other document concerned in or with the suit for divorce then filed by the libellant against the libellee; that while she was present in the courtroom she sat, not in any chair at the attorneys' table, but on one of the benches provided for the audience, except when she was called to the witness' stand; that she did not see Spencer, on said occasion, writing upon the original libel or summons and did not know or suspect that he was writing thereon, and especially she did not know or suspect that he was writing thereon what purported to be an acceptance of service upon affiant; that Spencer never informed her that he had so assumed to accept service, and that

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she is very imperfectly versed in the use and meaning of the English language, and unable to understand the same except when plainly spoken concerning everyday affairs and free from technical terms.

The circuit judge granted the motion and thereupon entered the order appealed from, vacating and setting aside the decree of divorce. Having carefully examined and considered the record before us we agree with the conclusion reached by the circuit judge. The question before him was, whether Spencer was authorized by the libellee to accept service for her in the divorce suit. The record fails to disclose any such authority, either express or implied. When Spencer says, "all that affiant did was with her full knowledge, sanction and approval," he merely states a bare conclusion, which is not warranted by any fact or matter set forth in his affidavit. He does not say that the libellee directed him to accept service for her, nor does he say that he was employed to represent her in the divorce suit. He was not her attorney in that suit.

It is also contended that the circuit judge has no power to vacate and set aside the decree. We do not so view the matter. The circuit judge having never acquired jurisdiction of the person of the libellee, the decree is absolutely void. 12 Ency. Pl. & Pr. 179. "A court may, at any time, vacate or set aside a judgment which is void, as, for example, a judgment rendered where there was a lack of the necessary jurisdiction, whether through omission or defect of service, or otherwise." 17 Ency. Law, (2d ed.) 825. See also, 23 Cyc. 905; 1 Freeman on Judgments, §98; 2 Bish. Mar. Div. & Sep. §§1545, 1563. The power existing, it seems to us that its exercise in this case is not only proper, but necessary in order that complete justice may be done. The application to vacate the decree was made within one week after it was signed and was made to the same judge who granted it. Neither party has remarried or assumed any relations involving the rights of third or innocent parties.

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The appeal is dismissed and the cause is remanded to the circuit judge with directions to proceed not inconsistent with this opinion.

J. A. Magoon (*Magoon & Weaver* and *N. W. Aluli* on the brief) for plaintiff.

C. W. Ashford for defendant.

WILLIAM W. BRUNER v. C. BREWER & COMPANY,
LIMITED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 5, 1911.

DECIDED OCTOBER 12, 1911.

ROBERTSON, C.J., PERRY, J., AND CIRCUIT JUDGE COOPER IN
PLACE OF DE BOLT, J.

ARBITRATION AND AWARD—*pending action—jurisdiction of court to order reference.*

In an action of law pending in one of the circuit courts of this Territory the court, without the aid of statute, has jurisdiction with the consent of the parties to refer the issues to arbitrators named by the parties, the stipulation further providing for the entry of the award as the judgment of the court.

Id.—*maintenance of action—validity of judgment.*

In such a case the reference to arbitrators does not of itself operate as a discontinuance of the cause and the judgment entered in pursuance of the stipulation and order of reference is valid.

Id.—*awards not lightly set aside.*

Awards of arbitrators are generally regarded by courts with favor and are not to be lightly set aside.

Id.—*disqualification of arbitrator—evidence.*

A charge that an arbitrator is disqualified, based solely upon a hearsay affidavit presented nearly two years after the filing of the award, cannot be sustained.

Id.—*findings of fact—evidence.*

In the absence, at least, of a transcript of the evidence, an award will not be set aside on the ground that certain interest claimed was not allowed or on the ground that the arbitrators accepted as true evidence claimed after the filing of the award to be false.

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OPINION OF THE COURT BY PERRY, J.

The original action was assumpsit for \$10,361.78 brought by the present plaintiff in error against the present defendant in error upon a contract for the care, shipment and sale by the defendant of coffee consigned to him by the plaintiff. The defendant filed an answer of general denial. Subsequently the parties agreed to arbitrate the issues raised under the pleadings and entered into and filed in the cause a stipulation in writing to that effect, naming therein three persons who were to serve as arbitrators, making certain provisions as to the time of hearing, as to the admission of certain evidence and as to the minimum and the maximum of the award to be rendered, and further providing that the award "shall be final and conclusive upon the parties both upon the law and the facts" and that "thereupon a final judgment shall be entered in accordance therewith." The parties appeared in court by their respective attorneys and asked that an order be made referring the issues to the arbitrators named in accordance with the stipulation and the order was thereupon made by the court as prayed for. The arbitrators on May 10, 1909, filed in the court and cause a statement of their conclusions awarding to the plaintiff the sum of \$737.49 with interest thereon at the rate of seven per cent. per annum from September 1, 1906. On March 25, 1911, defendant moved that the award be entered as the judgment of the court. The former of these motions was denied and the latter granted, formal judgment being filed June 29, 1911. To that judgment the present writ is sued out by the plaintiff, the making of the order referring the issues to arbitrators, the denial of the motion to set aside the award, the granting of the motion to enter judgment and the entry of the judgment being assigned as error.

The plaintiff contends that the court was without jurisdiction to make the order of reference and to enter judgment upon the award on the ground that the submission to arbitration was not authorized by our statute, R. L., Ch. 142, and cannot be

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supported under the common law procedure. Section 2187, R. L., provides that "all controversies, which might be the subject of a personal action at law, or of a suit in equity, may be submitted to the decision of one or more arbitrators, in the manner provided in this chapter," and section 2189, that "the parties shall appear personally, or by attorney, before the district magistrate or any judge of the court of record agreed upon, and upon their acknowledging the execution of the written submission and producing the same before such magistrate or judge, he shall cause the same to be entered as a rule of court; after which neither party shall have a right to revoke the submission without the consent of the other." The specific points advanced in this connection are that the statute contemplates the submission of those controversies only which are not yet the subject of judicial proceedings and that the acknowledgment referred to in the statute is a formal declaration such as is required before notaries with reference to deeds and is to be accompanied by a certificate of the acknowledging officer in the usual form. To what extent, if at all, these objections are good it is unnecessary to consider for we are of the opinion that the submission is in conformity with and authorized by the procedure of courts without the aid of statute. It may be added at this point that if the submission was within the terms of the statute the entry of judgment upon the award is specifically authorized by the statute and no statutory ground for setting aside the award or reversing the judgment has been alleged. The grounds named in section 2196 for resisting the entry of judgment are exclusive. *Richards v. Ontai*, 20 Haw. 198.

We are not now concerned with the inquiry as to the validity of a judgment on an award of arbitrators where the reference to arbitration was by order of the court without consent of the parties or was by stipulation of the parties without rule of the court or where the judgment was entered in the absence of an express stipulation for its entry or where the controversy was

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not the subject of pending judicial proceedings. In the case at bar the controversy was in court, the parties assented to the reference, the court made the order and the stipulation and the order expressly provided for the filing of the award in court and the entry of judgment thereon. Under these circumstances a trial by arbitrators and the adoption of their award as the judgment of the court in the cause is one of the well established modes of determining controversies. It was well known at the common law and has been long recognized in the United States. "A trial by arbitrators appointed by the court with the consent of both parties as one of the modes of prosecuting a suit to judgment is as well established and as fully warranted by law as the trial by jury." *Alexandria Canal Co. v. Swann*, 5 How. 82, 88. "The practise of referring pending actions is coeval with the organization of our judicial system. * * * The practise of referring pending actions under the rule of court, by consent of parties, was well known at common law and the report of the referees appointed, when regularly made to the court pursuant to the rule of reference and duly accepted, is now universally regarded in the state courts as the proper foundation of judgment." *Heckers v. Fowler*, 2 Wall. 123, 128, 131. "The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law." *Newcomb v. Wood*, 97 U. S. 581, 583. In the case last quoted from the decision was, indeed, based as well upon the statute of Ohio but it was competent for the court to assign two grounds for its conclusion. The statement just quoted cannot be regarded as obiter dictum. See also *The Bank of Monroe v. Widner*, 11 Paige 529, 533; *Green v. Patchin*, 13 Wend. 293, 296; *Wells v. Lain*, 15 Wend. 99, 102, 103; *Yates v. Russell*, 17 Johns. 461; *Cunningham v. Howell*, 23 N. C. 9, 10; *Wear v. Ragan*, 30 Miss. 83; *Allen v. Hickam*, 156 Mo. 49, 50; *Zehner v. Coal Co.*, 187 Pa. St. 487, 493. Nor

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did the reference to arbitration, in this instance, of itself operate as a discontinuance of the cause. The parties and the court expressly stipulated for the entry of judgment in the cause. They contemplated the further maintenance of the action. The authorities to the effect that a discontinuance results are based upon the theory that the parties have, by their acts, selected another tribunal and desire the determination of the judicial proceedings; but that rule has no application in cases in which it clearly appears that the parties contemplated the continuance of the action and the aid of the court in enforcing the award. "There is nothing in the mere agreement to submit a matter to arbitration which must of necessity have the effect of discontinuing suit brought for the same matter. A valid submission may be made, leaving the suit in full life, provided it appear from the agreement itself that such was the intention of the parties." *Wells v. Lain*, supra. "When the terms of the agreement provide that the action is to remain upon the docket and that judgment thereon is to be entered in accordance with the award of the referees, there is no discontinuance." *Hearne v. Brown*, 67 Me. 156, 158. See also 5 Ency. L. & P. 257; *Lary v. Goodnow*, 48 N. H. 170, 175, and other cases cited above.

Our statute on the subject does not exclude other methods of submission to arbitration. *Merrill v. Lenehan*, 4 Haw. 670, 671. There is no statement in the stipulation or in the order that the submission is under the statute. By supporting it, as it can be, as a common law submission, there is no substitution of a new contract in place of that entered into by the parties. The terms of the agreement, as made, can still be carried out in the view that this is a submission within the inherent powers of the court to recognize and enforce.

Another contention of the plaintiff is that one of the arbitrators was disqualified from participating in the determination of the issues by reason of the following facts: that he was a stockholder in Castle & Cooke, Ltd., a Hawaiian corporation,

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that Castle & Cooke, Ltd., was a stockholder in Welch & Co., a California corporation, and that Welch & Co. was liable to reimburse to the defendant the amount of any damages that might be awarded against it by the arbitrators and therefore was interested in the award. The only evidence in support of the facts so alleged is that contained in an affidavit made by the attorney for the plaintiff, sworn to March 25, 1911, based solely upon information said to have been given by the plaintiff to the deponent through correspondence. The question whether Welch & Co. was liable to Brewer & Co. was one of mixed law and fact. Whatever the powers of the court may be, in such a case as this, concerning the re-examination of an award, it would be going too far to set aside an award upon a finding of fact and a ruling of law based solely upon a hearsay statement made two years after the date of the award. Awards are generally regarded by courts with favor and are not to be lightly set aside. 3 Cyc. 586; 5 Ency. L. & P. 225; *Tyler v. Dyer*, 13 Me. 41, 47, 49. Upon the showing made in this case courts would not hesitate to deny a motion for a new trial in an ordinary action.

The award is further attacked on the ground that the arbitrators failed to allow to the plaintiff interest upon the sum of \$3585.70, the minimum named in the stipulation and order as due to the plaintiff from the defendant. That sum, however, as appears from the stipulation, was to be paid by the defendant to the plaintiff contemporaneously with the execution of the stipulation and no express direction is contained in the agreement or order touching an allowance of interest. It is not shown, moreover, that at the hearing the item was called to the attention of the arbitrators or that it was not in fact considered by them or even that some interest was not included in the amount awarded (\$737.49). The transcript of the evidence adduced is not before us. What the facts were for or against the allowance of interest does not appear. Under all these circumstances and in view of the fact that arbitrators are not con-

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fined to a determination of strict legal rights but may decide upon equitable principles, this objection to the award cannot be sustained.

The plaintiff asks that the award should be set aside on the further ground that the evidence given before the arbitrators by a witness named Greig was false. This claim, likewise, rests solely upon an affidavit to the effect that the deponent is informed by the plaintiff that upon investigation made by him in San Francisco since the date of the award, he, the plaintiff, finds that the facts relating to one of the items in dispute between the parties were directly to the contrary of what in Greig's testimony they were said to be. In opposition an affidavit was filed by the defendant to the effect that other evidence was admitted at the hearing before the arbitrators which tended to support the statements of Greig on the point mentioned. In the absence, at least, of a transcript of the evidence, the findings of the arbitrators can not, upon this showing, be disturbed.

The judgment of the circuit court is affirmed.

C. W. Ashford for plaintiff.

R. B. Anderson (Kinney, Prosser, Anderson & Marx on the brief) for defendant.

EDZAL MARKLE v. NOELI MARKLE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 16, 1911.

DECIDED OCTOBER 19, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

DIVORCE—jurisdiction—time of hearing.

Circuit judges are without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee, in whatever method service may be accomplished, or after appearance without service.

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OPINION OF THE COURT BY PERRY, J.

This is an appeal from the refusal of a circuit judge at chambers to set aside a decree of divorce entered by him. The libel in the case was filed on February 1, 1911, and personal service on the libellee made February 7. The libellee's answer was filed on February 10, the hearing had on February 17 and a decree granting the divorce rendered on February 18. The motion to set aside was based on the ground that on February 18 the circuit judge was without jurisdiction to hear and determine the case and the sole issue before us is whether the motion was well founded in law.

The question is purely one of statutory construction. Sections 2230 and 2231 of the Revised Laws, as amended, the first by Act 25 of the Laws of 1909 and the second by Act 109 of the Laws of 1907, read as follows: "Section 2230. Libel; Filing; Summons; Service; Time of Hearing. All proceedings for divorce shall be commenced by libel to be signed by the libellant and sworn to; and the same shall set forth the marriage of the parties and the cause for divorce, with sufficient particularity to constitute a case for judicial action.

"Such libel shall be filed in the office of the Clerk of a Circuit Court, and upon the filing thereof a writ of summons with the libel annexed shall be issued under the seal of the court by the clerk, directing the High Sheriff or his deputy, or the Sheriff of the County or his deputy, to summon the libellee to appear thirty days after service before the Circuit Judge at chambers to answer the libel.

"Such summons and libel shall be served by delivering certified copies thereof to the libellee personally.

"The Judge shall not entertain jurisdiction of the libel until at least thirty days after such personal service shall have been completed, except as provided in the following section."

"Section 2231. No person shall be entitled to a divorce unless the libellee shall have been served personally with process, if within the Territory, or shall have entered an appearance in the case; provided that, if it shall appear by return of the

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summons or by affidavit or otherwise to the satisfaction of the judge that the libellee is without the Territory, the judge may authorize notice of the pendency of the libel and of the time and place of hearing to be given to the libellee personally by such person and in such manner as he shall designate, or, if it shall further appear to his satisfaction by affidavit or otherwise that the libellant does not know the address or residence of the libellee and has not been able to ascertain either after reasonable and due inquiry and search for six months after the filing of the libel, the judge may authorize such notice to be given to the libellee by publication thereof at least once a week for six successive weeks in a newspaper or newspapers suitable for the advertisement of notices of judicial proceedings published in the Territory, and may hear and determine the case at or after the time specified in such notice, which shall be not less than thirty days after the giving of such personal notice or the last publication of such published notice, as the case may be."

The contention of the libellant in defense of the decree is that the provision that "the judge shall not entertain jurisdiction of the libel until at least thirty days after such personal service shall have been completed" is a detail of mere procedure, not affecting jurisdiction of the subject-matter, and is therefore capable of being waived and, further, that the provision itself in consequence of the use of the words "except as provided in the following section," aided by section 2231, is subject to an exception in favor of instances where the libellee enters an appearance in the court and cause.

The earlier statutes now relied upon (R. L., Secs. 1648, 1649 and 2229) did, indeed, grant jurisdiction to the circuit judges in chambers to hear and determine divorce cases, but the provision just quoted from section 2230, as amended, clearly constitutes a limitation upon that jurisdiction. It specifies the earliest time when the power to hear and determine any particular case first exists, and to that extent qualifies the earlier grant of jurisdiction over the subject-matter. The provision cannot be construed as relating to a mere detail of procedure which the parties may at their option waive. The language is

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mandatory. The words "shall not," taken in their ordinary signification, constitute an express inhibition, and no countenance is to be found in the remaining language of the statute on the subject of divorce for the view that the provision is directory only. On the contrary, the causes leading to the enactment support the view that the provision was intended to be mandatory and not subject to waiver. Just prior to the date of the act of 1909 divorce cases in this Territory, and particularly in the first circuit, had greatly increased in number, and the tendency had developed towards a very rapid disposition of such cases, instances occurring of the dissolution of the bonds of matrimony within a very few minutes of the filing of the libel. The act was doubtless passed by way of an attempt to prevent fraud and to secure to the parties in cases of ill-considered petitions time for reflection and possible reconciliation. The purpose of the provision would be frustrated if it were to be construed as leaving it within the power of the parties to waive it. Strictly speaking, an exception is a restriction by taking out something which would otherwise be included, as in a class, statement or rule. In this sense no exception is provided for in section 2231 to the rule stated in section 2230. No provision relating to the length of the period to elapse after personal service within the Territory is made in section 2231, and that is the only class which is referred to in the last paragraph of section 2230. Section 2231 merely provides, in effect, that valid service of some kind or, that which is its equivalent, an entry of appearance shall be indispensable to the securing of a divorce, and then specifies the circumstances under which personal service without the Territory or service by publication may be made, adding a specific statement as to the time when the judge shall be authorized to hear cases of the two classes last mentioned, the provision being that such hearing and determination "shall be not less than thirty days after the giving of such personal notice"

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(meaning personal notice served without the territorial jurisdiction) "or the last publication of such published notice, as the case may be." Section 2231 makes provisions additional to those contained in section 2230. The phrase "except as provided in the following section" is merely an inexact and inartificial expression, intended to anticipate and introduce the provisions in the succeeding section relating to the time of hearing in cases in which personal service within the jurisdiction is not obtained. The same phrase, used in the same sense, has been incorporated in section 2230 in the various forms in which it has existed since 1870. See Laws of 1870, Ch. 16, Sec. 3; Laws of 1878, Ch. 26, Sec. 2; Compiled Laws of 1884, p. 435; Civil Laws of 1897, Sec. 1932; Laws of 1903, Act 22, Sec. 3; Revised Laws of 1905, Sec. 2230. The two sections read together are clear and unambiguous. In whatever method service of summons may be accomplished the jurisdiction to hear and determine accrues only after the expiration of thirty days from the completion of such service. The entry of appearance is recognized, as it has always been, as the equivalent of service in any one of the modes in which it may be validly made, but the sections cannot be construed as showing an intention to render the thirty-day provision inapplicable to instances where the appearance is entered without service. The very cases just referred to are the ones in which more frequently and with greater cause collusion or other fraud is to be suspected. It cannot be held that the legislature, after carefully providing a remedy in the classes of cases where ordinarily it is less needed, failed to provide it in instances where ordinarily it is most needed. Statutes must receive a reasonable construction. The intention of the legislature to deprive the courts of the power to hear or determine any divorce case within less than thirty days after the completion of service on the libellee, or its equivalent, has been sufficiently expressed.

With reference to the libellant's contention that the words

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"or shall have entered an appearance in the case" in section 2231 constitute the exception referred to in section 2230, it would perhaps be sufficient to say that in the case at bar personal service was actually made, and that therefore the exception, if any, does not apply; but in order to avoid any possible misconstruction of our ruling we prefer to base it upon the broader grounds above stated.

The cause is remanded to the circuit judge with instructions to set aside the decree and for such further proceedings as may be appropriate.

F. Schnack (*E. C. Peters* with him on the brief) for libellant.

N. W. Aluli (*Magoon & Weaver* with him on the brief) for libellee.

FRANCISCO S. BORGES v. MARIA ADELAIDE BETTENCOURT BRIOZO DE SAQUEIRA ENCAMACAO.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 2, 1911.

DECIDED OCTOBER 20, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EQUITY—*jurisdiction*—*constructive service*.

Section 1840, Revised Laws, which authorizes constructive service upon non-resident defendants in suits in equity is valid and operative only in those cases in which equity has jurisdiction according to the general principles of equity to proceed in matters in which the decree may operate directly upon property.

SAME—*removal of cloud—remedy in personam*.

In the absence of statute a court of equity has no inherent power by the mere force of its decree to annul a deed or to establish a title.

The relief sought in this case being the removal of a cloud upon title by the delivering up and cancellation of an alleged fraudulent deed is purely *in personam*, and jurisdiction of the

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person of the defendant, a non-resident, cannot be acquired through service by publication.

OPINION OF THE COURT BY ROBERTSON, C.J.

This was a bill in equity for the cancellation of a deed on the ground of fraud. The bill sets forth, in substance, that the complainant is a resident of Roseas, Azores Islands, and that the defendant is a resident of the State of California; that on or about the 9th day of August, 1907, the defendant caused to be recorded in the office of the registrar of conveyances in the City and County of Honolulu, Territory of Hawaii, a deed whereby the complainant purported to convey to the defendant certain lands owned by the complainant situated in this Territory, a copy of said deed being attached to the bill; that the complainant did not execute, sign or deliver said deed, and did not make any conveyance of his interest in said lands to the defendant; that said deed and the signature of the complainant thereto are fraudulent; that said deed constitutes a cloud upon the title of the complainant to said lands which complainant seeks to remove; and that the complainant has no speedy and adequate remedy at law. Complainant prayed that said cloud be removed; that the defendant be required to deliver up and cancel said deed; for general relief; and for the issuance of process requiring the defendant to appear and defend. The bill was signed and sworn to by Matheus Silveira Nunes Bettencourt, attorney-in-fact for the complainant. The deed in question purports to convey all the grantor's undivided one-third interest in two pieces of land situated in Honolulu, described by metes and bounds, habendum to the grantee "from and after the death of the grantor." Summons was issued, and the officer's return thereto showed that upon due and diligent search the defendant could not be found within the Territory, but that he had delivered to each of three persons residing upon and in possession of the premises referred to in the bill of complaint a certified copy of the summons and bill and at the same

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time showing each of them the originals. The complainant then filed the affidavit of one J. P. Mendonca, who deposed that the defendant was never an inhabitant of the Territory of Hawaii, but resides at 150 Moss Avenue, in the City of Oakland, State of California; whereupon the circuit judge made an order that service of process upon the defendant be made by publication, and that a copy of the summons and petition be deposited in the postoffice at Honolulu, addressed to the defendant at her place of residence. Subsequently affidavits were filed showing that the service by publication had been made and that a certified copy of the summons and complaint had been mailed as directed by said order.

The defendant appeared specially by counsel and moved "that the above entitled action be dismissed, for the reason that it appears that the court has not obtained jurisdiction over the person of this defendant, the cause of action as stated in and by the complaint filed herein, if any is so stated, being in its nature transitory, and not *in rem*, but *in personam*." The circuit judge granted the motion, and made and entered an order dismissing the bill at complainant's costs. The complainant appeals from that order.

It is not averred in the bill of complaint that the complainant is in possession of the land in question, but no point has been made of the fact by the defendant. The possibility that the jurisdiction of the court below might be affected by reason of the lack of such an averment will, under the circumstances and in view of the conclusion reached, be passed over.

Counsel for the complainant contend that a suit to remove a cloud upon title is a proceeding *in rem sub modo*, in which constructive service will give jurisdiction when the same is authorized by statute; that we have such a statute in this Territory; and that the circuit judges, having cognizance of all such matters in equity, can give relief *in rem*, though their decrees would have no force *in personam*, when jurisdiction has been obtained upon constructive service on a non-resident de-

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fendant. They rely largely on the cases of *Arndt v. Griggs*, 134 U. S. 316; *Roller v. Holly*, 176 U. S. 398, and upon two cases in our own reports hereinafter referred to. Counsel for the defendant take the position that the case at bar is in its nature purely personal and transitory, and that, therefore, the court below could acquire no jurisdiction over the person of the defendant except by means of personal service of process upon her within this Territory. They rely principally on the case of *Hart v. Sansom*, 110 U. S. 151.

The question of whether the courts of California could afford the complainant relief was discussed in the briefs, but we hold that the case must be decided without reference to what, if any, rights the complainant may be able to assert against the defendant under the laws of that State.

Section 1840 of the Revised Laws contains a general authorization of service of process by publication in equity cases whenever the defendant cannot be found by the officer charged with the service of process.

Our statute (R. L. Sec. 1834) dealing with the jurisdiction of circuit judges in equity, after enumerating certain matters of equitable cognizance, provides that such judges "shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law."

Suits to quiet title to real estate, to remove clouds, or to cancel instruments are not included in the enumeration referred to, but there is no doubt that under the clause above quoted the equitable jurisdiction of the circuit judges does extend to such matters.

The question is whether, "according to the usage and practice of courts of equity," jurisdiction exists to remove a cloud upon title to land so that the court may make a decree which would be effectual to accomplish the relief sought in this case in the absence of personal service on the defendant.

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Equitable jurisdiction has been very generally extended by statutory enactments in the States. In 1 Pomeroy's Equity Jurisprudence (3d ed.), Sec. 170, it is said: "Although it was said in the earliest days of the jurisdiction of chancery, and has been constantly repeated by writers and judges to the present time, that equitable remedies act wholly on the person, *in personam*, and not upon property, *in rem*, the exact meaning and limits of this rule must be accurately understood, or else it will be very misleading, and will entirely misrepresent the theory of the equity remedial system. * * * This ancient quality in the operation of equitable remedies has been greatly modified by various statutes in the United States, which, in some instances, provide that a decree establishing an estate, interest or right of property in the plaintiff shall execute itself, shall be of itself a muniment of title, by divesting the defendant of the interest and vesting the same in the plaintiff, without any conveyance or other instrument of transfer."

No such statute exists in this Territory. But the importance of such a statute clearly appears from the decided cases. In *Arndt v. Griggs*, *supra*, the court said: "If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing title thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real

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estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it." (134 U. S. 320, 321.)

The fact that such a statute, an enactment of Nebraska, controlled the decision in that case suffices to distinguish it from *Hart v. Sansom*, *Roller v. Holly*, and the case at bar.

The case of *Hart v. Sansom* involved the validity of a decree of a State court for the removal of a cloud upon the title of land within the State, rendered against a citizen of another State who had been cited by publication only. The court said: "Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. * * * It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. * * * But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title." (110 U. S. 154, 155.) Although it has been said that *Arndt v. Griggs*, in effect, overruled *Hart v. Sansom*, we think in view of the difference in the facts involved in each, the two cases are not inconsistent.

In *Bennett v. Fenton*, 41 Fed. 283, 286, Shiras, J., said:

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"When the decision in *Hart v. Sansom* was announced, it was generally held to lay down the rule that a decree in equity quieting the title to realty operated only as a decree *in personam*, and therefore was of no force, when based only on service by publication on a non-resident defendant. In the light of the subsequent cases decided by the supreme court, it is questionable whether too broad a construction has not been given to the language used in that opinion; or perhaps, it would be more accurate to say that sufficient consideration and weight has not been given to a limiting clause in the opinion, wherein it is stated that, 'upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, but operates *in personam* only, by restraining the defendant from asserting his claim,' etc. In other words, if the enforcement of the decree touching the title is dependent solely upon the inherent powers of a court of chancery, it is, of necessity, a decree *in personam*, because generally equity jurisdiction is exercised *in personam*, and depends upon the control of the court over the parties. If, however, there is a statutory power given to the court to effectuate its decree by controlling the property, then the proceeding becomes in its nature a proceeding *in rem*, and in such case service by publication, in case of non-residents, will confer jurisdiction to deal with the property." Touching on this point, the court in *Arndt v. Griggs*, referring to *Hart v. Sansom*, said: "There was presented no statute of the State of Texas providing directly for quieting the title of lands within the State, as against non-residents, brought in only by service by publication, such as we have in the case at bar, and the only statute cited by counsel or referred to in the opinion was a mere general provision for bringing in non-resident defendants in any case by publication; and it was not the intention of the court to overthrow that series of earlier authorities heretofore referred to,

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which affirm the power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits, as against a non-resident defendant, notified only by publication." (134 U. S. 329.)

In *Hill v. Henry*, 66 N. J. E. 150, 155, referring to suits strictly *in rem* and those *quasi in rem*, the court said: "Both of the classes of cases last mentioned have this in common. The *res*, the subject of the controversy, is within the jurisdiction, and it is because it is so that the court is able to affect defendant's interest in it. There is a further case, illustrated, so far, by proceedings to quiet title. The case is based upon a denial of any '*res*' in the defendant. In this class of cases the supreme court has taken a distinction. If the decree sought be a decree operating *in personam* only, to be made under the ordinary jurisdiction of equity—a decree, for instance, that the defendant make or cancel a conveyance; that defendant be restrained from asserting his claim—it can only be made after personal service within the jurisdiction or after appearance. *Hart v. Sansom*, 110 U. S. 151. But if the decree be taken under a statute which authorizes the court to determine the question of title and to decree it to the party entitled, then it binds without such service or appearance if the statute has provided 'a reasonable method of imparting notice.' *Arndt v. Griggs*, 134 U. S. 316."

The principle recognized in *Hart v. Sansom*, that in the absence of statute a court of equity has no inherent power, by the mere force of its decree, to annul a deed or to establish a title, has been repeatedly affirmed by the supreme court and should be regarded as firmly established. See *Carpenter v. Strange*, 141 U. S. 87, 106; *Dull v. Blackman*, 169 U. S. 243; and *Fall v. Eastin*, 215 U. S. 1, 10.

The effect of a statute like those involved in *Arndt v. Griggs* and in *Bennett v. Fenton* is to constitute a proceeding brought under the operation of its provisions in its nature a proceed-

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ing *in rem*. The decree in such a proceeding can affect only property within the jurisdiction of the court, but as to such property it is substantially a proceeding *in rem* within the broader sense of that term as it was defined in *Pennoyer v. Neff*, 95 U. S. 714, 734. But a statutory provision, such as section 1840 of the Revised Laws, which provides for service by publication upon non-resident defendants in suits in equity generally, is ineffectual to give jurisdiction in suits other than those essentially *in rem* and in which the decree operates directly upon the subject-matter.

Dealing with such a statute, the supreme court in the case of *Roller v. Holly*, said: "We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against non-resident defendants. * * * Where a statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation." (176 U. S. 406, 407.) That case involved the validity of a judgment of a State court in an action to recover upon notes given for the purchase price of certain land and to foreclose a vendor's lien upon the land to the amount of the notes. It was conceded that the judgment for the money claim was invalid as a personal judgment against the non-resident defendant, but it was held that the foreclosure of the lien upon the land was proper and effective.

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In a case involving a similar statute the supreme court of Montana held that a court cannot acquire jurisdiction over a defendant in a suit to enforce the specific performance of a contract to convey land upon service by publication. *Silver Camp Mining Co. v. Dickert*, 31 Mont. 488, 501.

We see no difference in principle between a suit for specific performance of a contract to convey land and one to compel the cancellation of a deed.

In the case at bar the relief prayed for is clearly *in personam*. The complainant asks for a decree ordering the defendant to deliver up and cancel the deed in question in order that the cloud resulting from the recordation of that deed may be removed from his title to the land. In this respect the case differs from both *Byrne v. Allen*, 10 Haw. 668, and *Bicknell v. Herbert*, ante, p. 132. The former case was a creditor's bill filed to reach and apply to the satisfaction of a judgment held by the plaintiff certain property belonging to the principal defendants and situated within the jurisdiction of the court which had been attached. The court there said (p. 671): "Whether personal service is necessary in any case will depend upon the nature of the case. If the judgment sought is a personal one within the State, personal service must be had upon defendant, or he must make voluntary appearance, in order to obtain jurisdiction of the person of the defendant and fix his personal liability. But a judgment which operates upon the property is in the nature of a proceeding *in rem*, and does not require that personal service be had." *Bicknell v. Herbert* was a garnishment case, and the question was whether substituted service upon an absent defendant in such a proceeding was sufficient. It was there said: "When a judgment purely *in personam* is sought, personal service is indispensable; but when the proceeding is *in rem* or *quasi in rem* substituted service will suffice. A garnishment such as that in the case at bar, where the object sought is to apply the property of

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the defendant, to wit, the debt due to him by a third party, to the satisfaction of his debt to the plaintiff, is a proceeding *quasi in rem* within the meaning of this rule." (Ante, pp. 136, 137.)

We may summarize as follows: That our statute confers jurisdiction in equity upon the circuit judges in all unenumerated cases where according to the usage and practice in chancery there is not a plain, adequate and complete remedy at law. That the statute providing for constructive or substituted service upon absent defendants, being a general one, is operative only in so far as equity has jurisdiction according to the general principles of equity to proceed in matters in which the decree may operate directly upon property, as, for example, suits to foreclose mortgages or liens, or to partition real estate, or suits involving attachments. And that while power may be conferred by statute upon a court of equity to annul a deed and to remove a cloud, or establish a title by the mere force of its decree as to property within its jurisdiction, such power has not been conferred upon the circuit judges sitting as courts of equity in this Territory.

The order appealed from is affirmed.

R. B. Anderson (Kinney, Prosser, Anderson & Marx on the brief) for plaintiff.

E. M. Watson (Thompson, Wilder, Watson & Lymer on the brief) for defendant.

ANE KAEHU v. MEEAU NAMEALOHA.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED OCTOBER 9, 1911.

DECIDED OCTOBER 23, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

TENANCY IN COMMON—ouster—answer, effect of.

Where the plaintiff in an action of ejectment sues for and claims the entire interest in and the right to the possession of

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all the land involved in the action, and the defendant, instead of claiming only a moiety, files an answer denying generally all the allegations contained in the plaintiff's complaint, the answer constitutes ouster, and relieves the plaintiff from the necessity of proving it by any other evidence.

Id.—*recover to extent of title.*

A plaintiff in ejectment may take judgment as co-tenant according to the extent of his title.

OPINION OF THE COURT BY DE BOLT, J.

This was an action of ejectment and was tried by the court, jury waived, the decision being that the plaintiff and the defendant, together with another, were tenants in common of the land in controversy, and that the plaintiff take nothing. The plaintiff having excepted to the decision generally, without alleging any error in particular, her bill of exceptions was dismissed. Ante, 350. Thereafter the plaintiff sued out a writ of error which was quashed on the ground that final judgment had not been entered. Ante, 516. The case being remanded the circuit court filed a so-called "revised decision," which, in addition to the finding that the plaintiff and the defendant, together with another, were tenants in common, set forth reasons and findings not contained in the first decision, which, in substance, were that the plaintiff had not made it certain what lands she claimed; that the description given was not sufficient to identify the lands; that there was a failure of proof as to ouster of the plaintiff by the defendant, hence the defendant was entitled to judgment.

The purpose in filing the "revised decision" is not entirely clear, but it may be assumed that the circuit judge, as well as counsel, had some doubt as to the sufficiency of the reasons given in the first decision, in view of the requirements of Act 117 of the Laws of 1909. Be that as it may, the "revised decision" was filed without any objection by counsel, and in view of the fact that the right of the circuit judge in filing it has not been questioned, we will assume for the purposes of this

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case that it was the decision of the court such as is contemplated by the statute alluded to.

Upon this decision being filed judgment was entered "that plaintiff take nothing in this action, that defendant go hence without day, and that defendant have judgment for costs; to which judgment and decision the plaintiff duly excepted and which exception was allowed."

It was admitted by both parties to the action at the time that one Keku (k) was the common source of title to the land in controversy and that he died intestate, seized of the land in fee simple. The question thus presented is, who were the heirs of Keku? The plaintiff claims the entire interest in the land by virtue of a deed executed to her by Kaapuni (w) and Kahiamoe (w), who were, as she contends, the only heirs of Keku—his next of kin. The defendant during the trial admitted the relationship of Kaapuni and Kahiamoe to Keku, but she contends that they only inherited an undivided one-half interest, and that she, as the daughter and sole heir of one Halauai (w), was likewise an heir of Keku, and as such inherited the other undivided one-half interest in the land. The plaintiff contends that there never was any such person as Halauai.

The plaintiff's contention that Kaapuni and Kahiamoe were the only heirs of Keku is based upon the following relationship, namely: That Kaliloa, Kauhaa and Kaainoa were sisters; that Kaliloa was the mother of Kaapuni and Kahiamoe; that Kauhaa was the mother of Uluhea (w) and Waililii (k); that Uluhea was the mother of Keku; that Kaainoa had no children; and that all the persons thus named, as well as all other persons possessing inheritable blood, were dead, leaving Kaapuni and Kahiamoe as the next of kin and only heirs of Keku. The defendant, while she admits the relationship of the persons just named, contends that Halauai was a sister of Kaliloa, Kaainoa and Kauhaa. The trial court found in favor of this contention; and, aside from the admissions by the par-

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ties, there was evidence tending to support the respective claims of each party upon the question as to the relationship of Halauai to Kaliloa, Kauhaa and Kaainoa. This was purely a question of fact, and, like all other facts involved in the case, exclusively within the province of the trial court to determine. This court has repeatedly held that in a jury waived case, the findings of fact by the trial court, when there is evidence tending to support them, have the same force as the verdict of a jury.

The plaintiff also contends, in the event that the view of the defendant as to the existence and relationship of Halauai to Kaliloa, Kauhaa and Kaainoa should be accepted by the court, that upon the death of Keku the land passed to his uncle, Wailiilii, and Wailiilii and Kahiamoe having intermarried, upon the death of Wailiilii, leaving no heirs other than his widow, Kahiamoe, the land passed to her, which she conveyed to the plaintiff by the deed signed by herself and Kaapuni. In this view of the case Kaapuni, of course, conveyed nothing by that deed, because she had nothing to convey. But there is absolutely no evidence tending to sustain this claim. The defendant offered no evidence at all upon this phase of the case, but the testimony of the plaintiff herself and that of her own witnesses is clear and conclusive that Wailiilii died several years before Keku died; consequently Kahiamoe, as the widow of Wailiilii, inherited no interest whatever in the land. The plaintiff's claim thus made is obviously without merit.

The plaintiff's exception to the "judgment and decision" was on the following grounds: "1. It should have been decided, that Kahiamoe, as widow of Wailiilii, inherited the whole fee and conveyed it to the plaintiff. 2. It should have been decided, that whether or not, as such widow, she was the sole heir of Wailiilii, she, in any event, would be a tenant in common with others to the exclusion of the defendant. 3. It should have been decided there was no evidence to show that the de-

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fendant's mother was a sister of Kauhaa (w), and, therefore, that the defendant was a tenant in common with the plaintiff's grantors Kaapuni (w) and Kahiamoe (w). 4. Assuming the plaintiff and defendant are tenants in common of said lands, which plaintiff denies, it should have been decided the plaintiff take an undivided interest. 5. Assuming there is no evidence of title by inheritance, in either the defendant, or the plaintiff's grantors, it should have been decided that the plaintiff recover the premises by right of prior possession."

With regard to the sufficiency of the description of the land, it may be observed that it was set forth in the pleadings in the usual manner, that is to say, by giving the numbers of the royal patents and of the land commissioners' awards, as well as by setting out the metes and bounds, and the royal patents and awards were offered in evidence. This we think was sufficient. The question litigated was one of title and not of boundaries. Therefore, as regards the sufficiency of the description of the land the circuit judge was in error.

Neither can we agree with the circuit judge in his view that the plaintiff take nothing because she did not adduce evidence to prove ouster by the defendant. Under the pleadings in this case it was not incumbent on the plaintiff to adduce any evidence of ouster. The plaintiff, by her complaint, as well as at the trial, claimed the entire interest in and the right of possession to all the land involved in the action. The answer filed by the defendant denying the plaintiff's title and right to the possession was a confession of ouster and rendered the proof thereof unnecessary on the trial. *Carter v. Kaikainahaole*, 17 Haw. 528, 536; Newell on Ejectment, 133.

In *Nahinai v. Lai*, 3 Haw. 317, 318, the court said: "If the defendant claim as sole heir, and the tenant fail to suggest that he claims but a moiety, I think the demandant may treat him as claiming the whole, and as a disseizor of whatever portion he may himself be entitled to."

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Moreover, the question of ouster does not seem to have been raised by counsel for the defendant, but only by the circuit judge in the "revised decision." Counsel do not even allude to it in their brief. *Territory v. Puahi*, 18 Haw. 649, 655; *Uuku v. Kaio*, ante, 567, 572.

A plaintiff in ejectment may recover as co-tenant to the extent of the title proved by him. *Nahinai v. Lai*, supra; *Un Wong v. Kan Chu*, 5 Haw. 225, 227; *Ching On v. Amana*, 6 Haw. 625, 626; *Aylett v. Keaweamahi*, 8 Haw. 320, 328. The fact that the plaintiff in the case at bar proved title to an undivided interest only, if she did so prove, did not debar her from recovering to that extent.

The exception is sustained, the decision and judgment against the plaintiff is set aside and vacated, and a new trial granted.

T. M. Harrison for plaintiff.

D. H. Case and *Enos Vincent* for defendant submit the case on a brief.

KAUPENA (w) v. ELIZABETH KAIO, AND ELSIE
KAPU, A MINOR, BY HER GUARDIAN.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED OCTOBER 16, 1911.

DECIDED OCTOBER 24, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COURTS—*stare decisis*.

The court declines to consider *de novo* the question involving the construction of section 2513, R. L., decided in *Uuku v. Kaio*, ante, p. 567, nothing new or different having been advanced in the way either of argument or authorities.

EVIDENCE—*proceedings in probate for distribution of personal property as evidence in an action to quiet title*.

A claim of title to land in an action to quiet title is not prejudiced by reason of the failure of one claiming as an heir to ap-

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pear and make claim to a share of the personal property of the decedent in a probate proceeding had upon the administrator's petition for allowance of accounts and discharge.

A decree of distribution made in such a proceeding is not evidence in an action to quiet title to land against one not a party to the proceeding.

OPINION OF THE COURT BY ROBERTSON, C.J.

"This is a statutory action to quiet title to certain lands situate on the Island of Kauai. The case was tried in the court below before a jury and resulted in a verdict for the defendants. The plaintiff brings exceptions.

Certain facts were admitted, viz.: That one Isaac Kahilina died seized and possessed of the lands described in the plaintiff's complaint; that said lands were conveyed by deed to said Kahilina on April 15, 1890, by one Mika, the same having been conveyed to him on the same day by Ana Kini, wife of Kahilina; and that plaintiff and defendants each claim an interest in said lands as heirs of the said Kahilina.

It was not disputed that Kahilina left no children, nor did the plaintiff dispute the alleged relationship of the defendants as a niece and grand-niece, respectively, of Kahilina, but the defendants disputed the claim of the plaintiff that she is the grand-daughter of a half-brother of Kahilina.

Plaintiff's contention was, and there was evidence tending to support it, that Kahilina had a half-brother named Paulo, and that Paulo died leaving several children of whom the plaintiff's mother was one. If that were so plaintiff would have inherited an interest in the lands.

The first point to be noticed is the contention made by the defendants that, assuming the facts to be as claimed by the plaintiff, she has not shown any right to or interest in the lands in question. The contention now made is the same as that advanced by the defendants in the case of *Uuku v. Kaio*, ante, 567, namely, that the heirs of Paulo could not inherit, in view

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of the provision contained in section 2513 of the Revised Laws, because, as it was claimed, the land came to Kahilina by gift from his wife, Ana Kini, and that the heirs of Paulo are not of the blood of Ana Kini. The argument of defendants' counsel received careful consideration in the case referred to, and as nothing new or different has been advanced in the way either of argument or authorities we do not feel disposed to consider the matter *de novo*. We are satisfied that the conclusion reached in the former case was correct.

Two of the plaintiff's exceptions relate to the refusal of the trial judge to give certain instructions requested by plaintiff. But those exceptions cannot be considered for the reason that the court's charge as a whole has not been made a part of the record. *Torson v. Beckley*, ante, 406, 409.

Exceptions 16 and 17 relate to the admission in evidence, over plaintiff's objections, of portions of the record of the circuit court of the fifth circuit—in probate—at chambers, in the matter of the estate of Isaac H. Kahilina, deceased, consisting of the order of notice of the petition of the administrator for the allowance of his accounts and discharge, affidavit of publication thereof, and the decree entered in said cause, "that all and singular the estate and property, real, personal and mixed, of said Isaac H. Kahilina be and the same hereby is awarded and distributed in equal parts and undivided moieties to Elizabeth Kaio and Rose Kaukaha Desha."

Referring to that evidence the trial judge instructed the jury as follows: "In bearing upon the truth or falsity of the claim made by the plaintiff in this case, you may take into consideration the decree of heirship heretofore rendered by the court in probate proceedings as well as the notice published requesting all persons claiming as heirs of said Isaac Kahilina to appear before the court and submit their claim. If you believe, from the evidence, that the plaintiff was of age at the time of publication of such notice and the signing of such de-

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er of heirship and knew that proceedings of this nature were being had before the court, you may consider the failure of said plaintiff to then present her claim as bearing upon the validity or invalidity thereof." Plaintiff excepted to the giving of that instruction. Here, we find reversible error. It has been decided that the plaintiff in an action of ejectment is not bound by the adjudication of heirship made with reference to personal property in probate proceedings in which neither he nor his grantors were parties. *Mossman v. Hawaiian Government*, 10 Haw. 421. The notice referred to recited that the administrator charged himself with the sum of \$1,490.80; asked to be allowed the sum of \$1,452.74, that his accounts be approved, and that a final order be made distributing the remaining property; and notified all persons interested to appear and show cause why the petition should not be granted, and to present evidence as to who were entitled to said property. It did not purport to be a proceeding affecting real estate. It was simply the usual form of notice used in this Territory on the filing of an administrator's final accounts upon his petition for discharge. There is no evidence in the record tending to show that the plaintiff had actual notice of the proceeding referred to, but even if there had been such evidence the plaintiff might have declined or neglected to present a claim to share in the distribution of the personal property without waiving any claim she might have had in or to the real estate of the decedent. In other words, if the plaintiff was entitled to an interest in the lands in question as an heir of Isaac Kahilina her failure to present a claim to the personal property in the probate proceeding did not affect or prejudice her title to the land. The evidence referred to was improperly admitted and the instruction given the jury with reference to that evidence was prejudicial to plaintiff's case. The exceptions relating thereto are sustained.

We deem it unnecessary to pass upon the remaining exceptions.

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The verdict is set aside and a new trial ordered.

S. K. Kaeo for plaintiff.

M. F. Prosser (*Kinney, Prosser, Anderson & Marx* on the brief) for defendants.

No. 13. K. YAMAMOTO v. YOSHIMASU SAKURAI.
Motion to Dismiss Appeal. Argued October 23, 1911. Decided October 24, 1911. Robertson, C.J., Perry and De Bolt, JJ. Per curiam: The defendant appealed from a decision of the district magistrate of Wailuku, Maui, upon points of law. Plaintiff moves that the appeal be dismissed on two grounds, viz.: (1) That no questions of law have been certified to by the magistrate; and (2) that the defendant's appeal bond is not in conformity with the statute in that it contains no covenant on the part of the defendant that he will not remove or dispose of his property. 1. Under rule 14 of this court, the magistrate's certificate stating the points of law upon which the appeal is taken may be filed at any time, at least, before argument on the merits. 2. Section 1858 of the Revised Laws, as amended by Act 23 of the Laws of 1909, relating to appeals from district magistrates, does not require that a bond on appeal in this class of cases shall contain a condition that the appellant will not remove or otherwise dispose of his property. The contention that section 1884, R. L., and section 1886 thereof, as amended by Act 84 of the Laws of 1911, require the giving of such a bond in this case, is not sustained. The motion is denied.

E. Murphy for the motion.

H. G. Spencer contra.

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KANEOHE RANCH CO., LIMITED, A CORPORATION, v. KANEOHE RICE MILL COMPANY, LIMITED, A CORPORATION; H. HACKFELD & COMPANY, LIMITED, A CORPORATION; A. HANEBERG, ADMINISTRATOR OF THE ESTATE OF L. AHLO, DECEASED; NANNIE R. RICE AND DAVID RICE, HER HUSBAND; LAHELA AHLO; ANTHONY AHLO; S. N. CASTLE ESTATE, LIMITED; TERRITORY OF HAWAII; BATHSHEBA M. ALLEN; THE RIGHT REVEREND LIBERT HUBERT BOEYNAEMS, BISHOP OF ZEUGMA; J. A. MAGOON; ON TAI KEE, WONG HUNG YEE, CHUN SAU MUN, LUM HOO, LUM FAT, LUM YICK CHONG, YIM CHON HANG, YIM TIN KONG, YIM HOY, LUM MOK CHEE, AND C. LAI YOUNG, MANAGER, COPARTNERS UNDER THE NAME AND STYLE OF SUN TAI WAI; MAIKAI ALOIAU; HALEAKA MAKAOINI; BRUCE CARTWRIGHT, TRUSTEE OF THE ESTATE OF E. KALELEONALANI; WILLIAM HENRY; B. R. BANNING; W. G. IRWIN; DORA L. EMERSON; E. A. McINERNY, W. H. McINERNY AND J. D. McINERNY, TRUSTEES UNDER THE WILL OF M. McINERNY, DECEASED; HENRY H. PARKER; WONG LEONG; AUKAI; SOPHIA K. WILEY; LAPEKA POEPOE; JOHN BELL; MARY P. PAHUI; MRS. J. T. DOWNING; CHARLES SILVA; CHONG LUM SUP; GEORGE WATSON; ROWLAND WATSON; JACOB WATSON; EMMA KEAKAHIWA; MARIA LIILII; CHING ON; KALUA KAPUKINI; M. WAHINEOKAI; CHARLOTTE A. CARTER; MARY A. CARTER; ALFRED W. CARTER, TRUSTEE FOR RACHAEL A. CARTER; J. O. CARTER; HENRY C. CARTER; SARAH C. BABBITT; J. S. B. PRATT, SR., AND J. S. B. PRATT, JR., JOSHUA D. PRATT, HESTER PRATT, CATHERINE PRATT, DUDLEY PRATT AND LAURA M. PRATT, MINORS; EMILIA SILVA; THOMAS SILVA; SARAH SILVA; RO-

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SIE O'HARA; MARY ANN HORNER; HATTIE DOAK; JOSEPH SILVA, EMILIA SILVA, JOHN SILVA AND GEORGE SILVA, MINORS; AND JOHN DO, RICHARD ROE, MARY BLACK, RACHAEL BLUE, JOHN OAHU, SAMUEL MAUI AND JAMES HAWAII, UNKNOWN OWNERS AND CLAIMANTS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 10, 1911.

DECIDED OCTOBER 25, 1911.

ROBERTSON, C.J.; PERRY AND DE BOLT, JJ.

WATERS AND WATER COURSES—*parties—reversioners.*

In a suit for the adjudication of water rights, under chapter 143, R. L., commenced by a lessee of an ahupuaa the holders of the reversionary interest may properly be named as parties defendant.

Id.—*allegations of petition—location of lands and time and place of diversion.*

In the petition in such a case it is unnecessary to set forth the precise location of the lands of the respondents, provided it is alleged that they are situate within the ahupuaa; nor is it necessary to allege the time of the commencement of the alleged unlawful diversion of water or the place of the taking.

Id.—*statement of existence of controversy.*

An allegation that the petitioner is the owner of and entitled to all the water of the stream in an ahupuaa except a definitely named quantity and that respondents are wrongfully diverting more than that quantity against petitioner's protest and under a claim of right, is a sufficient statement of the existence of a controversy justifying the maintenance of the suit.

Id.—*nature of proceedings under chap. 143, R. L.*

Proceedings before a circuit judge under chap. 143, R. L., for the settlement of a controversy concerning water rights were intended by the legislature to be simple, expeditious and inexpensive and were not intended to be characterized by the formal procedure of equity. The petition in the case at bar held sufficient.

OPINION OF THE COURT BY PERRY, J.

On March 25, 1910, the Kaneohe Ranch Co., Ltd., a corporation, filed its petition before one of the circuit judges of

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the first circuit, sitting under the provisions of chapter 143 of the Revised Laws, as amended by Act 56 of the Laws of 1907, relating to settlement of controversies concerning water rights. In the petition the Kaneohe Rice Mill Co., Ltd., H. Hackfeld & Co., Ltd., and S. N. Castle Estate, Ltd., corporations, A. Haneberg, administrator of the estate of L. Ahlo, deceased, Nannie R. Rice and David Rice, her husband, Lahela Ahlo, Anthony Ahlo, Bathsheba M. Allen and the Territory of Hawaii were named as parties defendant and the allegations in brief were that the petitioner was the owner of certain waters in the ahupuaa of Kaneohe, Oahu, that Ahlo in his lifetime and since his death his administrator and the Kaneohe Rice Mill Co., Ltd., had without right, but under a claim of right, diverted a part of the waters belonging to the petitioner, and that the remaining defendants claimed some interest in the water of Kaneohe stream, but what those claims were or the extent of them was unknown to the petitioner. The prayer was for an injunction and for such other relief as might be appropriate. Summons was issued returnable May 31, 1910. The Rice Mill Co., Bathsheba M. Allen and the Territory demurred and the demurrers were sustained on the ground that the petition failed to set forth "the name of the landowners or occupants having an interest in the controversy * * * together with the whereabouts of each such landowner or occupant, did not specify with exactness how much land in a portion of the ahupuaa known as Waikalua was held by the petitioner, was indefinite in its statement of the source and nature of the water rights claimed by the petitioner and did not allege that the persons named as defendants included" all of the landowners or occupants having interests in the controversy.

An amended petition was filed January 19, 1911, and the hearing set for February 4. In this second petition other persons and corporations were named as parties defendant and allegations were added, or made more specific, concerning the

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area of certain kuleanas and other lands at Waikalua entitled to water. Lahela Ahlo, Nannie R. Rice and David Rice answered, but certain other defendants again demurred and their demurrers were sustained on the grounds that it did not appear that "all of the parties named include all of the landowners or occupants, having an interest in the controversy, known to the applicant; that certain allegations relating to the ownership of lands and waters by the petitioner were contradictory;" that "the ultimate fact or facts upon which such" (the petitioner's) "claim of ownership is based" should be set forth, and, apparently, that under the law the surplus waters of the ahupuaa claimed by the petitioner in its petition were not appurtenant to any portion of the ahupuaa and therefore did not pass to the petitioner under the leases under which it claimed.

Another amended petition was filed June 7, 1911, and citation issued for July 8. In this third petition additional persons are named as parties defendant. Of all the defendants thus before the court the petitioner says that they "are all the owners of land or occupants of the land within the said ahupuaa of Kaneohe and claim some interest in the said water of the Kaneohe stream, but what these claims are and the extent of the same is unknown" to it. Nannie R. Rice and David Rice again answered, but other defendants demurred and their demurrers were sustained, and, the petitioner declining to amend further, the bill was dismissed. From that order the case comes by appeal to this court.

The main allegations of the petition now before us are as follows: "That the defendant Nannie R. Rice is the owner in fee simple of the ahupuaa of Kaneohe, * * * being Royal Patent 7984, L. C. A. 4452, to H. Kalama, comprising an area of 9,500 acres more or less, and is also the owner of sundry ilis, grants and kuleanas in said ahupuaa and as such owner of said ahupuaa has the konohiki rights, is the owner and is entitled to all the water of said ahupuaa not appurtenant to

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kuleanas within its limits as hereinafter set forth; that within the limits of said ahupuaa there are kuleanas and konohiki land amounting to 259.765 acres, nearly all of which is now cultivated in rice, but which was formerly taro land, and has the right to use waters of the Kaneohe stream hereinafter mentioned to the extent hereinafter set forth, of which kuleana and konohiki land the said Nannie R. Rice is the owner of 135.913 acres and is the lessee of 18.84 acres of said land; that said Nannie R. Rice, as such owner and lessee of said land which was formerly taro land, is the owner and entitled to water from said Kaneohe stream for said land so owned and leased in the amount hereinafter set forth in addition to being the owner of all the waters of said ahupuaa not appurtenant to and used upon said land, formerly taro land, above set forth, as the owner and konohiki of said ahupuaa;" that under certain leases specifically referred to, and copies of which are attached, Nannie R. Rice leased to J. P. Mendonca the ahupuaa of Kaneohe and certain other lands within the same and that by assignment these leases passed to the petitioner; and that Nannie R. Rice made direct to the petitioner certain other leases, copies of which are likewise attached, of the ahupuaa and of certain other lands within the same; that under * * * the aforesaid leases this petitioner as lessee is the owner and entitled to all the waters flowing in said Kaneohe stream, which stream lies within and flows through said ahupuaa of Kaneohe, excepting the waters appurtenant to and used upon said land, formerly taro land, other than such of said land as is owned or leased by said Nannie R. Rice and leased to this petitioner, which first named lands contain 105.012 acres, which said land, formerly taro land, is entitled to use not more than 20,000 gallons of water per acre per day;" and that Ahlo in his lifetime, and since his death his administrator and the Kaneohe Rice Mill Co. "have without right and against the protest of this petitioner and said defendant Nannie R. Rice and David

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Rice, diverted from said Kaneohe stream water to the extent of five million gallons per day and have used the same and are using the same without right, but claiming the right so to use said water to furnish power for the rice mill of said Ahlo and his successors," his administrator and the Rice Mill Co., "to the injury of this petitioner * * * and by such diversion and use have deprived the petitioner * * * of the beneficial use of said five million gallons of water per day to its great damage."

The prayer is "that the rights of the parties be adjudicated and that it be adjudged that the defendants," the administrator and the Rice Mill Co., "are wrongfully diverting and using the said water in any amount so diverted and used exceeding 20,000 gallons per acre per day, necessary to irrigate the portion of the said 105.012 acres owned by them, that they be enjoined from using any of said water for said mill, and that petitioner be declared to be the owner as such lessee and entitled to the use as such lessee of all the water of said Kaneohe stream excepting such as is necessary to irrigate the said 105.012 acres aforesaid, not exceeding 20,000 gallons per acre per day; and for such other and further relief as your petitioner may be entitled to in the premises, as the nature of the case may require."

The grounds named in the demurrers are as follows: "(1) That it does not appear from said petition that the petitioner is entitled to the water therein claimed or to any such relief as is therein prayed for; (2) that it does not appear from such petition that the petitioner has suffered or will suffer any damage or injury by reason of any acts set forth in said petition; (3) that no controversy respecting water rights is set forth in said petition; (4) that there is misjoinder of parties in that defendants Nannie R. Rice and David Rice are improperly joined as parties defendant herein; (5) that the said petition is ambiguous, uncertain and unintelligible in that it fails to

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set forth (a) the location of the lands alleged to have rights in and to the water of said Kaneohe stream, (b) that said lands having rights to the water of said Kaneohe stream are situated within and form part of the ahupuaa of Kaneohe, (c) the time when the diversion of the water from said Kaneohe stream commenced, (d) what use of the water from the said Kaneohe stream is desired by the petitioner, (e) at what point upon said Kaneohe stream the water alleged to have been diverted therefrom is diverted and taken by these defendants for the use of their lands, and (f) the exact nature and extent of the konohiki rights claimed by petitioner and referred to in paragraph 2 of said petition, and (g) in praying that this defendant be enjoined from using any of said water for said mill, and (6) that under the allegations of said petition it appears affirmatively that the water in the said Kaneohe stream belongs to the people and is not subject to private ownership and it does not appear that the plaintiff has heretofore appropriated such water for private use."

The order appealed from was based on grounds 1, 5 (a) and 5 (f).

Nannie R. Rice and David Rice were proper, even though not indispensable, parties defendant. Under the allegations of the petition they are the lessors of the petitioner and hold the reversionary interest in the ahupuaa and in any other lands held by petitioner as lessee. Section 2201 of the Revised Laws, as amended by Act 56 of the Laws of 1907, directs that the summons shall be served upon "each landowner or occupant having an interest in the controversy." These defendants have an interest in the controversy. It may be that neither Ahlo's administrator nor the Rice Mill Co. will set up or be able to prove any claim to the water diverted which shall be good as against the holders of the reversionary interest; but it may also be that one or both of the defendants named will set up and prove such a claim. They may prove, for example, that by ad-

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verse use for more than the statutory period the diversion became rightful prior to the execution of the leases. This is said without considering or intimating whether the petitioner's lessors will be bound in case a prescriptive right is proved which commenced after the date of the lease or less than the statutory period before that date.

It was unnecessary for the petitioner to allege the precise location of the lands believed by it to be owned or occupied by the other respondents. It is alleged that they are within the ahupuaa and that their owners or occupiers claim certain rights to water from the Kaneohe stream. The petitioner is ignorant of the extent of those claims. It is sufficient that upon these allegations the parties so believed to have an interest in the controversy be notified to appear and present their claims. Each will have an opportunity to be heard in support of his own claim and by way of defense against the claims of the others if any conflict exists. It may well be that as between the greater number of the defendants no conflict will appear. Each claimant can, more conveniently than the petitioner and at less expense and with greater exactness, set forth the location and area of his land and the extent of the water rights claimed for it.

It is alleged that all of the lands owned or occupied by the respondents, on behalf of which water rights are believed to be claimed, are within the ahupuaa. It need not be alleged that they all form part of the ahupuaa. It may be that they do not. Kuleanas, while held as such, do not form a part of the ahupuaa even though situated within it.

The existence of a controversy is clearly alleged. It is averred that the petitioner is the owner of and entitled to all of the waters of the Kaneohe stream excepting the waters appurtenant to and used upon certain taro lands, containing an area of 105.012 acres, not exceeding, for such taro lands, 20,000 gallons of water per acre per day, and that Ahlo's administrator and the Rice Mill Co. are diverting five million gallons per day;

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that the diversion of all such water exceeding 20,000 gallons per acre per day, necessary to irrigate the portion of the 105.012 acres owned by the defendants named, is wrongful and against the protest of the petitioner and under claim of right by the defendants. It would seem that this mere statement would suffice to show the existence of a controversy between the parties concerning their rights in the excess of water so diverted. Perhaps also a controversy is sufficiently alleged concerning the right of the two defendants named to use any of the water so diverted to operate a rice mill, but upon the latter point we express no opinion at this time.

It likewise sufficiently appears from the petition that if the petitioner is the owner of the water rights claimed by it the diversion complained of will, if allowed to continue, cause damage to the petitioner. The diversion, if continued for the period required by the statute of limitations under circumstances of hostility and otherwise so as to constitute an adverse use, would ripen into a right. See *Wong Leong v. Irwin*, 10 Haw. 265, 271; *Chafook v. Lau Piu*, 10 Haw. 308, 314; *Davis v. Afong*, 5 Haw. 216, 221, 222.

The time of the commencement of the unlawful diversion need not be alleged. Adverse possession, if claimed by any of the parties, is matter of affirmative defense. It is sufficient in order to justify the filing of the petition that there is a diversion at present, under claim of right, and that the right to so divert is disputed,—in other words, that a controversy exists.

Under grounds numbered above 1, 5 and 6, the main argument advanced by the respondents is that the leases to the petitioner of the ahupuaa and other lands did not pass the title to the surplus water on the theory that the latter is not appurtenant to the ahupuaa and that in any event it belongs, as the attorney-general claims, to the Territory, on the theory that the patent to the petitioner's predecessors in interest did not convey the water as an appurtenance, or, as some of the other respondents contend, to each and all of the kuleana holders and

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other occupants of the land within the ahupuaa, to the extent at least that each such holder or occupier can make use of it, under section 366 of the Revised Laws, which reads as follows: "Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses which individuals have made for their own use." Section 2201, R. L., relating to water right cases, provides that "no summons shall be set aside or dismissed because of any technical informality, provided it shall set forth the time and place of hearing, and the nature of the right claimed, in terms sufficiently clear for the appraisal of all parties interested." The petitioner's statement of his claim complies with the requirements of this provision. It is clear that it claims all of the water flowing in the Kaneohe stream other than the water appurtenant to and used upon the 105.012 acres mentioned in the petition. not exceeding 20,000 gallons per acre per day. Whether that claim is well founded we shall not determine upon these demurrers. The contention relating to the failure of the patent to grant the water and that based upon section 366 are, as far as we are aware, advanced now for the first time in the history of these islands and would seem, at first thought at least, to be contrary to the decision rendered in *Haw. Com. & Sug. Co. v. Wailuku Sug. Co.*, 15 Haw. 675, 680, and perhaps, directly or indirectly, to other Hawaiian decisions. Consideration of these contentions should not be undertaken unnecessarily. Proceedings such as this, before a circuit judge sitting as a successor to the commissioner (under the law as it formerly stood) of

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private ways and water rights, were intended by the legislature to be simple, expeditious and inexpensive. It was not intended that the formal procedure of equity should prevail. *McBryde Sugar Co. v. Koloa Sugar Co.*, 19 Haw. 106, 116, 117. The procedure attempted to be followed thus far before the circuit judge is quite as formal as could have been required in equity. The petitioner's claim is clearly stated. It may or it may not be good in fact or in law. The issues can be raised by answer or by an informal statement of claim. It may be that the facts developed at the trial will render unnecessary a consideration of the questions now sought to be raised by demurrer and thus greater expedition as well as simplicity will be attained.

Whether the intended use of the water by the petitioner is material to be considered depends upon whether the respondents' contentions concerning section 366 and the ineffectiveness of the patent to grant the water are sound.

In a proceeding of this nature the failure to allege the point at which the water is diverted from the stream is not fatal. The cause may well proceed to hearing without the allegation.

The order appealed from is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

D. L. Withington (*Castle & Withington* on the brief) for petitioner.

C. H. Olson (*Holmes, Stanley & Olson and Thompson, Wilder, Watson & Lymer* on the brief) for Kaneohe Rice Mill Co., Ltd., and certain other respondents.

J. A. Magoon (*Magoon & Weaver and N. W. Aluli* on the brief) for William Henry and certain other respondents.

E. W. Sutton, Deputy Attorney-General, for the Territory.

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TERRITORY OF HAWAII v. HU SEONG.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

ARGUED OCTOBER 23, 1911.

DECIDED OCTOBER 30, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

CRIMINAL LAW—*charge—furnishing opium—evidence.*

Where the defendant is charged with the offense of furnishing opium to another in violation of the statute and the evidence shows a sale and delivery of the opium by the defendant to another, a conviction of the defendant by the district magistrate must be sustained.

OPINION OF THE COURT BY DE BOLT, J.

(Robertson, C.J., dissenting.)

This is an appeal on points of law from a judgment of the district magistrate of Honolulu, finding the defendant guilty of the offense of furnishing opium or a preparation thereof to another, contrary to the provisions of section 1399, R. L., which reads: "The board of health may, upon the conditions to be named in such authorization, authorize any duly qualified physician or surgeon, or any person holding a license to sell poisonous drugs, to sell for medical purposes only, opium and preparations thereof; provided, however, that no person shall sell or furnish opium or any preparation thereof, except upon the written prescription of a duly licensed physician signed by him."

The charge entered against the defendant, and upon which he was tried and convicted, was, that he, "at Honolulu, * * * on the 24th day of August, A. D. 1911, then and there not being authorized by the board of health of the Territory of Hawaii, unlawfully and wilfully did furnish to one Chung Choy certain opium or preparation thereof, contrary to the provisions of section 1399 of the Revised Laws of Hawaii."

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At the trial before the district magistrate the witness Chung Choy testified: "I went into this place" (defendant's) "to buy opium. I paid money to the defendant and I received opium from him. I said, 'Give me a quarter's worth of opium.' He did not say anything, but caught hold of the Chinese scales and weighed the opium. He put the opium in a nutshell and handed it to me. I gave him a half dollar, and he gave me back in change 25 cents."

Officer J. R. Kellett testified: "I sent Chung Choy ahead to buy opium from the defendant. He went in, we followed him. We saw him and heard him ask for opium. I saw the defendant take a scale and then horn and needle, take some opium out and put it on the scale and weigh it. Then the defendant put the opium in a shell and wrapped it up in a piece of white paper and handed it to Chung Choy. We could see the whole transaction. Before Chung Choy went in I gave him a marked half dollar. After this transaction, we went in and took the opium from the informer. Apana took the opium and 25 cents change from him and I picked up the half dollar. We were looking through window pane. There was a curtain, but enough space to look through window and see the whole transaction."

At the conclusion of the case for the prosecution, the defendant moved that he be discharged "on the ground that he was charged with furnishing opium, while the evidence showed that a sale had taken place." The motion was denied. The defendant offered no evidence and rested. The court found the defendant guilty and imposed a fine of \$50 and costs.

The points of law on which the defendant appealed are these: "1st. Denying motion of defendant for his discharge. 2nd. In finding said defendant guilty as charged, for the reason that at the trial the evidence established the fact that if anything was done relative to said opium it was a sale of said opium and not a furnishing within the meaning of section 1399, Revised Laws of Hawaii. 3rd. In holding that as the evidence

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showed a sale of opium by the defendant, that said defendant could be convicted of the charge set forth in the complaint, viz., the furnishing of opium to another."

The question thus presented for determination is, whether, where the charge, as in the case at bar, alleges a furnishing and the evidence shows a sale and delivery of the opium, the conviction can be sustained. The word "furnish" is a comprehensive term and includes many different ways by which an article may be supplied or delivered by one person to and accepted by another. And, while the word "furnish" would, ordinarily, include within its meaning most transactions showing a sale and delivery of the article sold, yet it probably would not include all sales; such, for instance, as a sale without actual delivery of the article. In the view we take of the question before us the word "furnish" is synonymous with the word "supply" or "provide." A contract in terms to furnish coal on the cars at a particular place is in effect an agreement to there "deliver" the coal to the buyer. *Watson Coal & Mining Co. v. James*, 72 Ia. 184. A contract for goods to be "furnished" along the line of a certain railroad contemplated their shipment over such railroad and "delivery" by it to the purchaser. *Silverstry v. Missochi*, 165 Mass. 337. The word "furnish" as used in a mechanic's lien statute has been construed to mean the sale and delivery of the material. *Burns v. Sewell*, 48 Minn. 425, 531, 532. To "furnish," in its ordinary acceptance, means to supply, to provide for use, which necessarily contemplates a delivery of the article or thing to be used. In 20 Cyc. 863, the word "furnish" is variously defined as follows: "To equip or fit out; supply what is necessary or fitting; to fit oneself out; to supply; to supply with anything necessary or needful; to supply or provide; to provide for; to provide for use; to provide or supply anything wanted to another; to give away; to let one have; to sell; to find; obtain or procure." See also *Enlow v. Klein*, 79 Pa. St. 488, 490. Under a statute prohibiting the selling, furnishing or giving away of

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intoxicating liquor, the defendant was held to have been properly convicted under a count for furnishing intoxicating liquor upon proof of having given away the same, the court holding that giving away the liquor was one mode of furnishing it. *State v. Freeman*, 27 Vt. 524, 525. And it may also be observed that the sale and delivery of opium is one mode of furnishing it. In a case where the charge was for giving intoxicating liquor to a minor, while the evidence showed that the liquor was actually purchased in part with the money of the minor, the court held that the word "give" in its more enlarged sense meant "to furnish," "to supply," and held that the facts showed such a furnishing and a violation of the law. *Com. v. Davis*, 75 Ky. 240. In *Republic v. Akau*, 11 Haw. 363, the question was not whether the word "furnish," as used in the statute, could be held to include a sale, but whether it could be held to include a gift, and the opinion must be read with that fact in mind.

The words "sell or furnish" as used in our statute are not used in an opposing sense; while the words, "sell or give," as used in other statutes, are necessarily opposing and contradictory, and decisions based upon those statutes are of no assistance in this case. A sale does not include a gift. A gift does not include a sale. Proof of a sale does not prove a gift; neither does proof of a gift prove a sale. But "furnish" includes both a gift and a sale, in cases where the article is delivered. The word "furnish" was used to include within its meaning acts which obviously would not be included within the meaning of the word "sell," but it by no means follows that acts included within the meaning of and which constitute a sale and delivery of the article will not also constitute a furnishing.

The object of the statute is to suppress and restrain the use of and traffic in opium, and thereby eradicate the evil consequences of such use and traffic. The statute, therefore, should be read and construed with the legislative object constantly

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in mind. *Suth. Stat. Const.* §§241, 292, 354, 356. This rule of construction is as applicable to penal statutes as to others. *Com. v. Kimball*, 24 Pick. 366, 370. "One of the most effectual ways of discovering the true meaning of the law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it." Sec. 12, R. L. The facts disclosed by the evidence in this case bring it clearly within the letter, as well as within the reason and spirit, of the statute.

We therefore conclude that the evidence showing a sale and delivery of the opium by the defendant supports the conviction under the charge of furnishing.

The judgment of the district magistrate is affirmed.

J. W. Cathcart, City and County Attorney, for plaintiff.

Frank Andrade for defendant.

DISSENTING OPINION OF ROBERTSON, C.J.

I have to dissent. The statute prohibits the selling or furnishing of opium except by the holder of a license to sell poisonous drugs, upon the written prescription of a duly licensed physician. The charge entered against the defendant was of furnishing only. The uncontradicted evidence before the district magistrate showed a sale. The question is whether, upon a charge of furnishing opium the defendant can be convicted upon evidence that he sold opium.

According to the dictionaries the word "furnish" means "give," "supply" or "provide." In *Republic v. Akau*, 11 Haw. 363, 366, this court said that "furnish" means "provide" or "supply" and "does not import a consideration." The word is a broad and indefinite one, and standing alone would not, I think, necessarily negative a consideration. The point is not what the word is capable of meaning, but what is its meaning in this particular statute. In the statute in question, as in that involved in the *Akau* case, "furnish" must be held to

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mean something other than and different from "sell," which imports a money consideration. In *State v. Deusting*, 33 Minn. 102, where an ordinance provided that no person shall "sell, vend, deal in or dispose of" any spirituous liquors, the court said, "the terms 'dispose of' are meant to include *other forms of disposal* than indicated in the preceding words in the ordinance, though consistent with them as respects its intent and purpose." By inserting the word "furnish" in this statute the legislature evidently intended to provide against transfers of opium other than by sale.

The word "give" as well as the word "furnish" may or may not negative the idea of compensation according to the context. Fernald says: "To give is primarily to transfer to another's possession or ownership without compensation; in its secondary sense in popular use, it is to put into another's possession by any means and on any terms whatever."

Under statutes prohibiting the *selling* or *giving* of intoxicating liquors, it has repeatedly been held that proof of selling will not support a charge of giving, and *vice versa*. "Furnish" and "give" being synonymous terms, the same rule should be applied here. The reason for the rule is that two distinct offenses are created by the statute, and though both might properly be alleged in the same charge, where only one has been alleged the allegation is not supported by proof of the other.

In *Williams v. State*, 8 So. (Ala.) 668, the court said: "To convict a person of 'giving' away liquor contrary to law, he must be indicted or charged with the offense of 'giving' contrary to law, and not for 'selling.' In framing indictments of this character the safer plan is to have two or more counts charging the different offenses severally in separate counts." In *Humpeler v. People*, 92 Ill. 401, it was said: "It was a violation of the statute to either sell or give intoxicating liquor to a person in the habit of getting intoxicated, but an indictment for selling would not be sustained by proof that liquor had been given to a person in the habit of getting intoxicated,

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nor would an indictment for giving liquor be sustained by proof of a sale. A sale and a gift, under the statute, are distinct and separate offenses, and proof of one will not sustain a charge for the other." To the same effect see *Harvey v. State*, 30 Ind. 142; *State v. Freeman*, 27 Vt. 526; *Wood v. State*, 1 Ore. 223; 2 McClain Crim Law, Sec. 1235.

In my judgment the conviction should be set aside.

G. E. SMITHIES v. D. L. CONKLING, TREASURER
OF THE TERRITORY OF HAWAII.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED NOVEMBER 6, 1911.

DECIDED NOVEMBER 9, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

STATUTES—*construction of.*

Under Act 143 of the Session Laws of 1911, merchandise license fees paid after June 14, 1900, for annual licenses bearing date anterior to the date mentioned are to be refunded only as to a portion corresponding to the fractional part of the year which remained unexpired on that date.

OPINION OF THE COURT BY ROBERTSON, C.J.

After the opinion of this court was rendered in the case of *Smithies v. Conkling*, ante, p. 600, the parties filed a supplemental statement of facts upon which the judgment of this court is asked. It is now made to appear that of the claims presented by Smithies mentioned in the former opinion, some of them were for license fees paid after June 14, 1900, for one year in advance for licenses bearing date anterior to the date mentioned. On behalf of the plaintiff it is contended that the amount of such fees should be repaid in full on the ground that, having been collected after the license act became inoperative, the collection of such fees was wrongful notwithstanding that they

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were due and payable before that date. Counsel also claim that the question now presented was disposed of in our former opinion.

The point raised by the supplemental statement of facts was not presented by anything contained in the original submission. The language of the opinion must of course be understood to have had reference to the facts then before the court. Nothing contained in the opinion rendered was intended to apply to the situation now presented. The argument put forth to the effect that the collection of these fees must be regarded as wrongful because at the time of their payment the license law was invalid and the payment of them could not then have been legally enforced, encounters the stubborn fact that the payments were made to the treasurer without protest. If we were dealing with strictly legal rights the plaintiff would meet the apparently insurmountable obstacle that his assignors had paid the license fees voluntarily. But Act 143 of the Laws of 1911 was passed for the purpose of discharging the moral obligation which the legislature felt was owing to the claimants by reason of their having been required to pay license fees for which the government gave them nothing in return. The failure of the *quid pro quo*, however, did not occur till June 14, 1900, up to which date the license holders received what they paid for, and though the payments referred to in the supplemental submission were not made until after the 14th of June there is certainly a moral obligation owing by them to the government to the extent of benefits received. We think it is within both the spirit and letter of the statute to regard the amounts paid for license fees for annual periods which overlapped the 14th of June, 1900, as divisible, and to consider so much of those fees as were earned, so to speak, before that date as not wrongfully collected. We hold, therefore, that the plaintiff is not entitled to the repayment of the fees referred to in full, but that the government is entitled to retain such proportion of each fee paid as will correspond with the fraction of a year covered by the period

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from the date of the license to June 14, 1900. These amounts aggregate, according to the agreed statement of facts, the sum of \$223.45.

Judgment will be entered for the amount due the plaintiff according to the principles laid down in the former opinion and the present opinion.

A. A. Wilder and A. L. C. Atkinson (*Thompson, Wilder, Watson & Lymer* on the brief) for plaintiff.

E. W. Sutton, *Deputy Attorney-General*, for defendant.

No. 16. MARIA AIONA, NEE MARIA I, v. PONA-HAWAII COFFEE COMPANY, LIMITED. Exceptions from Circuit Court, Fourth Circuit. Motion for Continuance. Argued November 9, 1911. Decided November 10, 1911. Robertson, C.J., Perry and De Bolt, JJ. Per curiam: The plaintiff, who is the appellant in this case, filed a motion that the cause stand continued until December 4th next, for the purpose of allowing her an opportunity to make application to the court below for an amendment to her bill of exceptions. There were filed in this court, with the bill of exceptions, a transcript of the testimony duly certified by the official stenographer of the circuit court; plaintiff's motion for a new trial; and certain exhibits, but neither the transcript, motion nor exhibits were made part of the bill of exceptions by any reference contained in the bill itself. The object of the motion is to secure the necessary delay to enable the plaintiff to apply for an amendment in the circuit court which will incorporate those matters in her bill of exceptions and make them a part thereof. The motion is accompanied by the affidavit of A. G. Correa, attorney for the plaintiff, who deposes that the transcript and papers mentioned were "omitted by oversight" though intended to be referred to and incorporated in the bill of exceptions.

Such applications as this are not looked upon with favor by

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courts as they are liable to conduce to loose practice on the part of attorneys. We are not disposed to extend the granting of such relief as is here sought beyond the limits which have heretofore been recognized. On the authority of *Magoon v. Ahmi*, 11 Haw. 233, the motion is granted. That case was cited in *Kapiolani Estate v. Thurston*, 16 Haw. 147, as authority for the rule that a bill of exceptions may be amended in such a way as to make the exceptions already incorporated available, as by making the transcript of the evidence a part of the bill by reference thereto.

E. A. Douthitt for the motion.

C. H. Olson contra.

K. YAMAMOTO *v.* YOSHIMASU SAKURAI.

APPEAL FROM DISTRICT MAGISTRATE OF WAILUKU.

ARGUED NOVEMBER 6, 1911.

DECIDED NOVEMBER 14, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EXECUTION—*sheriff's sale upon defective notices.*

Where a sheriff levies upon and sells property under a writ of execution upon defective notice, and the judgment debtor, having the opportunity to object, does not object until twenty-three days after the property is sold, the sale is valid.

OPINION OF THE COURT BY DE BOLT, J.

This is an appeal by the defendant from a decision of the district magistrate of Wailuku on the point of law "that the district magistrate erred in overruling the defendant's motion to vacate and set aside the sheriff's sale" held under a writ of execution issued by the magistrate in the above entitled action. This appeal was first brought to our notice by the plaintiff's motion to dismiss. Ante, 657. The appeal is now before us

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on its merits. The motion was filed September 11, 1911, the grounds of which, in substance, were, that the notices of sale were fatally irregular and misleading, in that they purported to relate to and deal with an execution issued out of the district court in and for the county of Maui, on July 20, 1911, instead of an execution issued by the district magistrate of Wailuku, on June 20, 1911; that the officer executing the writ did not pursue the directions therein contained by advertising the property for thirty days, but sold it after advertising for nineteen days; that by reason of the fatal and gross irregularities in the advertisement and sale, the prices realized were disproportionate to the value of the property sold; that the levy made on July 28, 1911, was not justified in law, in that \$20 paid by the defendant to the deputy sheriff on account of the execution staid the writ until August, 1911.

The defendant filed his affidavit in support of the motion. The plaintiff did not dispute the facts as stated in the defendant's affidavit. The motion, therefore, was heard by the district magistrate on the defendant's affidavit alone, which established the following facts, namely: That on June 10, 1911, the district magistrate rendered judgment in favor of the plaintiff and against the defendant for the sum of \$142.48; that on June 20, the writ of execution was duly issued; that on July 18, the defendant paid to the deputy sheriff on account of the execution the sum of \$20—giving the defendant "until August, 1911," to pay the balance; that on July 28, the deputy sheriff returned the \$20 to the defendant and thereupon closed up the defendant's store and took "charge" of the goods and other personal property therein; that the deputy sheriff advertised the property for sale, the notices of sale purporting to show that the advertisement was begun on July 20, whereas, in fact, the notices were not posted up until July 31; that the sale was advertised to take place on August 19, at 3 o'clock P. M., on which date the sale was held, realizing the sum of \$144.70; that the price realized was disproportionate to the

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value of the property, which was reasonably worth the sum of \$285; that the sale commenced at 3 o'clock P. M., when most people were at work; that the defendant was unable to state who were the purchasers at the sale; that no notice of the levy and intended sale was posted on defendant's premises so as to advise his friends that the property was to be sold; that the notices of sale purported to relate to and deal with an execution issued out of the district court in and for the county of Maui, on July 20, 1911, whereas, the execution was issued by the district magistrate of Wailuku on June 20, 1911.

Section 1818, R. L., provides that "The officer shall, after levy, advertise for sale the property levied upon, whether real or personal, for thirty days, or for such time as the court shall order, by posting a written or printed notice in three conspicuous places within the district where such property is situated." The magistrate in the present case ordered that the property be advertised for sale for thirty days. The property was sold, however, as will be observed, nineteen days after the notices were posted.

The defendant contends that the deputy sheriff, by not pursuing the directions of the writ of execution and by his "gross carelessness in his notices of intended sale," caused a sacrifice of the property, and that the sale was void. It does not necessarily follow, however, that a sale of property made under a writ of execution, upon defective or insufficient notice, shall be void. This is a question to be considered in each case as it arises and determined according to the facts involved. The defendant in this case, however, fails to disclose upon what theory he expected to have this question of the validity of the sale adjudicated without having made the purchasers parties. 2 Freeman on Executions, §306. Be this as it may the defendant is silent as to any possible excuse or explanation which might have been offered tending to show why the matter of the defective notices was not seasonably brought to the attention of the district magistrate, or to the notice of the officer execut-

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ing the writ, such, for instance, as illness, unavoidable absence, or being otherwise unable to attend to his affairs; nor does he claim fraud, or mistake, or that he was misled in any way, or that the sale was not fairly conducted. He did not bring to the attention of the district magistrate any fact, nor does the record before us disclose any fact, tending to show that he did not see or have knowledge of, or have the opportunity of seeing the notices, or knowing of them, before the sale. In the absence of some showing to the contrary we are bound to assume that he at least had the opportunity of knowing of the form and purport of the notices of sale, and that he chose to take chances on the sale resulting favorably to him. He should not now be heard to complain, particularly in view of the fact that his only complaint seems to be that of inadequacy of the price obtained for the property. His objection was too late. He should not have waited until after the property was sold. We think he had it in his power to have prevented the sale. 2 Freeman, *supra*, §286. By his acts, or rather by his failure to act, he estopped himself from attacking the validity of the sale. 17 Cyc. 1269.

"An objection to the form of a notice can only be made by the defendant, and cannot be successfully urged by him, unless he proceeds to take advantage of it without any unnecessary delay. The notice of the sale, being for the benefit of the defendant, may be waived by him. * * * No doubt the proper method, in nearly all the States, of taking advantage of an insufficient notice, or of the absence of all notice, is by some motion or proceeding to prevent or vacate the sale." 2 Freeman, *supra*, §286; *Munger v. Fletcher*, 2 Vt. 524, 528; *Burroughs v. Wright*, 16 Vt. 619, 625.

Having reached the conclusion that none of the objections urged by the defendant against the validity of the sale are tenable, it will not be necessary to decide whether the district magistrate has power to vacate an execution sale on motion, or at all, or whether the vacation of such sale must be sought

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by bill in equity only. Whatever the powers of the magistrate may or may not be in this regard, his ruling in denying the defendant's motion to vacate and set aside the sale was correct. The sale, for the reasons stated in this opinion, was valid and binding on the defendant.

The decision of the district magistrate in overruling the defendant's motion to vacate and set aside the sheriff's sale is affirmed.

E. Murphy (*Lorrin Andrews* with him on the brief) for plaintiff.

H. G. Spencer for defendant.

PHILIP F. FREAR v. MORRIS ROSENBLEDT.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED NOVEMBER 7, 1911.

DECIDED NOVEMBER 16, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

SPECIFIC PERFORMANCE—agreement to convey—construction.

A contract to convey certain land by "a good and sufficient warranty deed" is in law an undertaking, not to furnish a deed good in form only, but to convey the title free from all encumbrances.

ID.—order to show cause—release of mortgage—evidence.

Upon an order requiring the respondent in a suit in equity to show cause why he should not, in compliance with a decree directing him to specifically perform such a contract, furnish to complainant a release of an outstanding mortgage, evidence offered by the complainant is, at least under the circumstances of this case, admissible which tends to show that the mortgagee is willing to release the mortgage upon payment of a sum not exceeding the agreed purchase price, even though the evidence was not offered at the hearing before decree.

APPEAL—stay of execution—specific performance.

In such a suit, pending an appeal from the discharge of an order requiring the respondent to show cause why he should not furnish a release of an outstanding mortgage as well as a warranty deed, the fund deposited in court by the vendee for payment of the agreed purchase price should not be paid over to the vendor.

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OPINION OF THE COURT BY PERRY, J.

This is a suit for specific performance. The allegations of the bill are that the respondent, being at the time "the owner of the land and premises" described "and of the land adjoining thereto over which exists a right of way," also described, on January 2, 1908, entered into a certain lease and agreement in writing with the complainant demising the premises described and the right of way and in the instrument further granted to complainant "a right and option to purchase said demised premises and right of way at any time within three years from the date of the agreement * * * for the sum of one thousand dollars," and covenanted that on payment of that sum within the time stated he would furnish to the complainant "a good and sufficient warranty deed" of the property in question; that on or about August 26, 1910, the complainant accepted and orally expressed to the respondent his acceptance of the option and tendered payment of the sum of one thousand dollars, and requested delivery of a deed in accordance with the terms of the agreement; that on or about September 12, 1910, the complainant verbally and in writing notified the respondent of his acceptance of the option and again made tender of payment of the consideration, and again requested a deed as required by the agreement; and that respondent neglected and refused to accept the tender and to execute and deliver the deed. The prayer is that the respondent be required to specifically perform the agreement of sale on his part and to deliver to complainant upon payment of the sum mentioned a good and sufficient warranty deed of the property. A copy of the lease and agreement is attached to and made a part of the bill.

In his answer the respondent, referring to the allegation of ownership as set forth in the bill and to the execution of the lease and agreement, admits the truth of the latter and alleges that on January 2, 1908, he was "the owner in fee simple of the premises, * * * but on said last named day said premises were subject to a mortgage to" the trustees under the will

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of S. C. Allen, "which said mortgage is still in force and effect and has not been satisfied and or released"; denies the truth of the allegations relating to the acceptances of the option and the requests for a deed; alleges that he has not sufficient information or belief to either admit or deny that on either of the days named the complainant tendered payment; that on January 2, 1908, the roadway in the agreement referred to was of the uniform width of not more than twelve feet, but that complainant, disregarding the terms of the option on August 26 and September 12, 1910, requested a grant of a right of way over a roadway "to be not less than twenty-four feet in width"; denies that respondent has neglected or refused to accept any tenders or to execute or deliver a deed as by the option required; and further denies that complainant has done all things required of him by the agreement.

The circuit judge decreed "that the agreement of sale in said indenture of January 2, 1908, be specifically performed and that said respondent, Morris Rosenbledt, be and he is hereby required and directed to make, execute and deliver unto the said Philip F. Frear a good and sufficient warranty deed of the premises mentioned and described in the said indenture" and of the right of way over the road mentioned, and that upon the execution and delivery "of said good and sufficient warranty deed * * * as hereinabove provided and decreed" the sum of one thousand dollars which had been deposited by the complainant in court be paid over to the respondent or deposited in the First National Bank of Hawaii to the account and subject to the order of the respondent.

From this decree neither party appealed. Correspondence followed in which the complainant demanded of the respondent the execution and delivery of a warranty deed of the property and of a release of the mortgage in favor of the trustees of the Allen estate and of any other outstanding encumbrances, and the respondent signified his willingness to furnish the deed, but not a release as requested. Thereupon the complainant pre-

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sented a petition for an order requiring the respondent to show cause why he should not comply with the decree, alleging "that there is now outstanding a certain mortgage on grant 153, in said decree described and referred to, and covering and affecting said premises directed by said decree to be conveyed to your petitioner," and that respondent had declared to complainant his intention to execute and deliver as a compliance with the decree "a deed which shall in point of form only and not in substance comply with said decree," and had declined to furnish complainant with any evidence of a release of the mortgage. At the hearing upon the order the complainant offered to prove these facts and the willingness of the mortgagee to release the property in question from the operation of the mortgage upon payment of the sum of one thousand dollars and interest thereon, and further offered to pay, if deemed necessary by the court, the interest, looking to the respondent for subsequent repayment, and asked that the fund in court be ordered paid to the mortgagee in order to secure the release. The court refused to receive the evidence, declared in effect that the delivery of a warranty deed without a release of the mortgage was a compliance with the decree, against the complainant's protest and in spite of the noting of an appeal by him ordered the fund in court paid over to the respondent and the deed to be deposited with the clerk subject to the order of the complainant, and discharged the order to show cause. From the latest order so made the complainant appealed to this court.

On behalf of the respondent it is contended that the decree requires merely the execution and delivery of a deed good in form and not the conveyance of a good title in fee free from encumbrances, that the evidence of the existence of the Allen mortgage and of the possibility of obtaining a release of the same should have been offered by the complainant, if at all, in the case in chief, that the complainant not having appealed from the decree the evidence is not now admissible.

The respondent's contract to furnish "a good and sufficient

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warranty deed" was in law an undertaking not to give a deed good in form only, but to convey the title free from encumbrances. *Clute v. Robison*, 2 Johns. 594, 613; *Guild v. Railway*, 33 L. R. A. (Kans.) 77, 81; *Moore v. Williams*, 5 L. R. A. (N. Y.) 654, 656; *Swan v. Drury*, 22 Pick. 485, 489; *Haynes v. White*, 55 Cal. 38, 40; *Delavan v. Duncan*, 49 N. Y. 485, 487; *Hinckley v. Smith*, 51 N. Y. 21, 24; *Bostwick v. Beach*, 103 N. Y. 414, 421; *Everson v. Kirtland*, 4 Paige 627, 638; Rawle's Covenants for Title, Sec. 32. The decree, adopting the language of the agreement, required "a good and sufficient warranty deed." No good reason appears for giving to this clause in the decree a construction different from that which is appropriate when the words appear in a contract. There is nothing in the remaining language of the decree itself to require a different construction. On the contrary the requirement in the decree that "the agreement of sale in said indenture of January 2, 1908, be specifically performed" renders it clear that the language was used in the decree in the same sense in which it was used in the contract. Whatever the agreement was which was contained in the contract, that the respondent was required by the decree to perform, and the agreement, as we have already held, was to convey a good title free from all encumbrances.

The burden was not upon the complainant to allege or prove in the first instance the respondent's ability to perform, but on the respondent to show inability, if any existed. *Borden v. Curtis*, 46 N. J. Eq. 468, 471; *Greenfield v. Carlton*, 30 Ark. 547, 556; 20 Pl. & Pr. 457. That defense was not presented in the answer. The mere assertion that the land in question was subject to a mortgage, not even the amount of the mortgage being stated, did not constitute a claim of impossibility of performance. If the mortgage was for an amount less than the contract price of one thousand dollars and was overdue, or if the mortgagee was willing to release on payment, no defense would be presented. The mortgage in that case could be ordered paid out of the fund in court. Whether any claim of

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impossibility of performance by reason of the existence of the mortgage was set up in the evidence we are unable to say, for the transcript of the evidence is not before us. In any event, even if that defense was interposed, it was not sustained, for the decree was, as above stated, that the respondent convey a good title free of encumbrances. The oral decision, made after the close of the trial, likewise excludes the theory that the court found the fact of impossibility of performance. Said the court: "I am satisfied that a good, valid and sufficient tender was made on the 26th day of August, 1910, in this: that all the witnesses agreed in stating that the cash was actually offered before the deed was even produced from the pocket—if he had it in his pocket—or from the possession—if he had it in his possession—till all discussion ceased in reference to cash at all. I do not think that counsel would intimate that either party has wilfully misstated anything. In the lapse of time other matters demand their attention. I do not believe that they wilfully misstated anything. Even Mr. Rosenbledt said, 'I will not say that he used the word *demand* on the 26th day of August, 1910,' but I have to say that even he would not commit himself that far." Then followed a statement that a decree would be entered in favor of complainant requiring the respondent to furnish to complainant a good and sufficient warranty deed to the premises and directing the clerk upon the delivery of the deed to pay the one thousand dollars to the respondent or to deposit it in the First National Bank to the account and subject to the order of the respondent. Not a word was said in the decision upon the subject of any claim of impossibility of performance or upon any subject other than that of the sufficiency of the tender made. Apparently the latter was the only issue tried.

The presumption is that the court correctly construed the agreement of the parties. The terms of the decree, as we construe it, are those which should properly be found in a decree overruling the only defense (that of tender) which was advanced. The complainant was under no necessity to appeal.

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He obtained a decree in his favor granting him all the relief to which he was entitled. The respondent first set up impossibility of performance as a defense to the order to show cause, and it was then that it first became the complainant's duty to meet the defense with evidence of the mortgagee's willingness to release the property in question and of the respondent's ability to perform by payment out of the fund in court or otherwise. The evidence should have been received.

The direction to pay the one thousand dollars in court to the respondent notwithstanding the complainant's appeal was also error. An appeal stays execution (Sec. 1861, R. L.) unless upon good cause shown the judge allows appropriate action to be taken for the enforcement of the decree. No attempt was made in this case to show cause. The order appears to have been made on the theory that the decree was "self-executing"; but in this jurisdiction, where no statute exists on the subject, equity acts *in personam* only and has no inherent power by the mere force of its decree to pass a title. *Borges v. Encarnacao*, ante, 638; *Hart v. Sansom*, 110 U. S. 151, 155. Pending the disposition of the appeal the decree should not have been enforced in whole or in part.

The order appealed from is set aside and the cause remanded for further proceedings not inconsistent with this opinion.

C. R. Hemenway (*Smith, Warren & Hemenway* on the brief) for complainant.

F. Schnack (*E. C. Peters* with him on the brief) for respondent.

ROBERTSON, C.J., CONCURRING.

The fact that the premises in question were subject to a mortgage was brought to the plaintiff's attention by the answer of the defendant. The status of the mortgage; the ascertainment of the amount due thereon; and the further facts, which plaintiff offered to prove at the hearing on the order to show cause, that although the mortgage covers other lands, the mort-

Frear v. Rosenbledt, 20 Haw. 682.

gagee is willing to release the land here involved upon payment of the sum of \$1000, with interest thereon, which latter the plaintiff is ready and willing, if the court should so direct, to advance, were all matters which should have been investigated and adjudicated at the hearing. And plaintiff should have had included in the decree, if the court found him to be entitled to it, a direction that the respondent discharge and remove the encumbrance. *Jerome v. Scudder*, 2 Rob. (N. Y.) 169, 173; *Grant v. Beronio*, 97 Cal. 496; *Hunt v. Smith*, 139 Ill. 296, 302.

Ordinarily, the entry of a final decree made without any reservation of further directions ends the cause, and no further proceedings, except by way of appeal, can be had. But a court of equity has the inherent right to direct by a subsequent order the manner in which a decree shall be enforced. *Mootry v. Grayson*, 104 Fed. 613, 618; *Cadotte v. Cadotte*, 120 Mich. 667; *Farmer's Loan Co. v. Pacific Ry. Co.*, 28 Ore. 44. And where the further direction asked for is merely consequential upon the decree itself, the proper course is to supply the omission by a distinct order without altering the decree. *Clark v. Hall*, 7 Paige 382; *Jarmon v. Wiswall*, 24 N. J. E. 68.

By the terms of the agreement the plaintiff was entitled to receive from the respondent a clear title in fee simple to the premises in question, and the intention of the circuit judge was, doubtless, to so decree. The supplemental relief sought by plaintiff, being consistent with the decree, ought not to be denied, if the plaintiff is otherwise entitled to it, merely because of the failure of his counsel to secure the inclusion in the decree of the order to remove the encumbrance. I think the circuit judge would have admitted the evidence offered by the plaintiff had he not entertained the erroneous idea that the decree was self-executing and operated to pass the title to the land to the plaintiff. I therefore agree that the order appealed from should be reversed.

Kaui v. See Kang, 20 Haw. 690.

KAUI AND KAHIALEUKI v. SEE KANG, ALSO
KNOWN AS YAU LEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 20, 1911.

DECIDED NOVEMBER 22, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*action for rent—proof of title.*

In an action by a lessor against a lessee to recover rent the plaintiff is not required, as part of his case in chief, to prove title to the demised premises.

OPINION OF THE COURT BY ROBERTSON, C.J.

The plaintiffs brought action in the court below to recover from the defendant rent alleged to be due and unpaid under a written lease made by Kala, Kaui and Kahaleuki to Yau Lee of certain premises on Punchbowl street, in Honolulu, for the term of twenty years from January 1st, 1900.

At the trial the plaintiffs adduced testimony tending to prove that the defendant was the person named as lessee in the lease in question; that the lessee entered upon and occupied the demised premises under said lease; that the defendant paid the rent reserved to the lessors up to and including the year 1909, and had refused to pay rent to them since though plaintiffs had made demand therefor; that some time in 1909 an agent of the Bishop Estate had surveyed the land, informed the defendant that it belonged to the Estate, erected a fence in front of his store, and offered to lease the land to him; that upon being told of that, one of the plaintiffs (Kaui) said to the defendant, "that place belongs to me, don't you get any lease from them;" that the defendant took a lease from the Bishop Estate, and has paid rent under it since August, 1909. Plaintiffs also put in evidence the record in the Estate of Pokane, deceased, Probate No. 4323.

At the close of plaintiffs' case, the defendant moved for a

Kaui v. See Kang, 20 Haw. 690.

non-suit without assigning any grounds therefor; and the court granted the motion, giving as a reason, in response to a question by counsel for plaintiffs, "no title to the premises and no right to lease them as a matter of fact," and an order was entered stating that "the plaintiffs having omitted to prove their title to the premises leased by them to the defendant, thus failing to show their right to lease the same, defendant's motion for non-suit is granted."

The probate record above referred to has not been included in the record upon these exceptions. The transcript of the proceedings and testimony shows that it was made to appear by that record that Kala, one of the lessors, had died, and that Kaui testified that Kala was her husband. At the argument in this court counsel for plaintiffs stated that he had introduced that record to show that the plaintiff, Kaui, had inherited Kala's title in the land. Defendant's counsel argue that that record may not have shown that Kaui had become possessed of Kala's interest in the premises, and that as Kaui failed to show what title she had in the land and what share of the rent, if any, the plaintiffs were entitled to, this court cannot say that the non-suit was improperly ordered. As appears above, however, the court granted the motion for non-suit because the plaintiffs had failed to show their right to lease the premises. If the defendant had assigned as a reason for this motion that plaintiffs had failed to show that either of them had inherited Kala's interest in the land, it would not have brought forth a ruling that plaintiffs had proven "no title to the premises and no right to lease them."

The probate record was admitted without objection or discussion, and it seems not to have entered into the ruling of the court.

If defendant's counsel desired to make the contention that the record failed to show what plaintiffs' counsel claimed it did show they should have made it in the court below. *Uuku v. Kaio*, ante, pp. 567, 572, 573.

Kaul v. See Kang, 20 Haw. 690.

The non-suit was ordered, apparently, on the theory that it was incumbent upon the plaintiffs, as a part of their case, to prove title to the demised premises. Such is not the law. The rule which prohibits a tenant from denying his landlord's title rendered it unnecessary for the plaintiffs to prove title to the premises of which they had put the defendant in possession. *Keelikolani v. Robinson*, 2 Haw. 514; *Kamauleule v. Nagamoto*, 9 Haw. 384; *Maile v. Chin Wo Co.*, 10 Haw. 289. It was held in the case last cited that an eviction of the tenant by one having a paramount title and the right to immediate possession is a good defense to an action for rent brought by a lessor. But in such a case, as it was also there held, the burden is upon the tenant to prove the validity of the title of the party to whom he has attorned. In the case at bar the defendant does not claim that he was evicted, and he made no attempt at the trial to show title in the Bishop Estate. Nor did he offer to restore the possession of the premises to the plaintiffs. The attornment to the Bishop Estate can only be regarded as a voluntary act on the part of the defendant, and one which he could not set up to defeat plaintiffs' claim for rent.

The exception to the order granting the motion for a non-suit is sustained, the order is set aside, and the case is remanded to the circuit court for further proceedings.

E. K. Aiu for plaintiffs.

C. H. Olson (*Holmes, Stanley & Olson* on the brief) for defendant.

Lucas v. Hustace, 20 Haw. 693.

CHARLES LUCAS, JOHN LUCAS AND MARY N. LUCAS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LUCAS BROTHERS, *v.* MELLIE E. HUSTACE AND J. R. DAVIS.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 23, 1911.

DECIDED DECEMBER 1, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

MECHANICS' LIENS—*right of material-man—contract against liens.*

The right to a lien which is given by statute to a material-man can not be destroyed by a provision against liens contained in the contract between the owner of the building and the contractor, to which contract the material-man was not a party and of which he had no knowledge.

OPINION OF THE COURT BY PERRY, J.

A circuit judge of the first circuit has certified to this court the following statement of facts and question of law: "Mellie E. Hustace, one of the defendants herein, having contracted with a contractor for the erection of a building on said defendant's premises and the said contractor having purchased materials from the plaintiffs herein, as material-men, which said materials were employed in the construction of said building; and said materials not being paid for and the plaintiffs, within the statutory time after the completion of said building, having duly perfected their lien as said material-men, upon said building and premises, pursuant to R. L. Chapter 140, is the plaintiffs' right to such statutory lien defeated by virtue of certain specific provisions contained in the contract between said defendant and the original contractor, of which plaintiffs had no actual notice or knowledge, the said contractual provisions being as follows: (a) 'No sub-contractor or other person furnishing material or labor to the contractor will be recog-

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nized, nor will the owner be responsible in any way for the claims of such persons beyond taking a bond. Persons so furnishing materials or labor have a right of action on said bond in the name of the owner for their use;' (b) 'All lumber to be purchased from Allen & Robinson' (i. e. material-men other than plaintiffs), 'also all other materials, provided that quality is as good and the prices are as reasonable as other parties?'"

Argument has been presented upon the question whether the above recited provisions of the contract sufficiently indicate an intention on the part of the owner and the original contractor to render unavailable to sub-contractors and other persons furnishing material the remedy by lien provided for by statute. In the view which we take of the case it will be unnecessary to consider this question. It will be assumed for the purposes of this opinion that the intention to bar sub-contractors and material-men is sufficiently expressed. It will be unnecessary also to refer to the second provision of the contract (that directing all purchases of material to be made from Allen & Robinson) any further than to say that if the first provision bars the claim of lien the plaintiffs can not in any event recover and that if it does not then the second likewise does not, for that which the contractor and the owner can not accomplish directly can not be accomplished by them indirectly. The second provision is equivalent to a stipulation that no one but Allen & Robinson can under any circumstances have a lien. Has the first provision the effect of barring a lien in favor of the plaintiffs who at the time of furnishing the material had no knowledge of the existence of the stipulation?

Very few reported cases are to be found upon the precise point now before us. The mechanics' lien statutes in various jurisdictions are dissimilar in their terms. Each decision must be read in the light of the statute upon which it is based. But little aid is obtainable for these reasons from the adjudications in other jurisdictions. Statutes elsewhere differ as to the parties in whose favor the lien is created. In some the lien, to

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whomsoever allowed, is limited to the amount of the contract price for the improvement and in others to the unpaid amount due the original contractor; in some provision is made for the registration of the original contract; and in various other respects the statutory provisions differ both as to the remedy and as to the prerequisites to obtaining it. In this jurisdiction the lien is given to "any person * * * furnishing labor or material to be used in the construction or repair of any building." R. L. Ch. 140. It accrues in favor of sub-contractors and material-men independently of the original contractor and not by way of subrogation to the rights of the latter (*Allen & Robinson v. Redward*, 10 Haw. 151, 153, 154); it is not limited to the amount of the price named in the original contract or to the balance remaining due to the contractors (*Id.* 154, 155, 156); and there is no provision for registration of the original contract.

The plaintiffs submit an elaborate argument in support of the constitutionality of the statute; but no claim of unconstitutionality has been presented by the defendant. On the contrary counsel for the defendant expressly say in their reply brief that they do not contest the constitutionality of the statute and that their claim as to the effect of the provisions of the contract is advanced irrespective of the theory upon which lien statutes are to be supported. The argument relied upon for the defendant is that the contractor in purchasing materials acts as the agent of the owner by virtue of the contract entered into with the latter, that the material-man must be conclusively presumed to have notice of all of the terms of the contract, that a person dealing with an agent can not bind the principal in matters beyond the power conferred upon him by the contract of agency and that therefore the plaintiffs in this case must be deemed to have had notice of the provision against liens and are bound thereby. Some statutes granting liens to sub-contractors and material-men have perhaps been supported upon this theory of agency and consent of the owner. That, how-

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ever, is not the theory prevailing in Hawaii. Liens under our statute have been upheld by this court as arising by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the materials are furnished for use in the owner's structure. They are founded upon the equity of assuring compensation to those who improve property for the owner. It has been specifically held that the sub-contractor is not bound by the terms of the contract concerning payments to the contractor or the amount of the contract price. *Allen & Robinson v. Redward*, supra. "In the ordinary sense the lien does not arise out of contract but is given by law to those who are placed under certain stated conditions; it arises out of contract in the sense only that the statute declaring that a lien shall exist under those circumstances for the price of certain materials, the owner, when he awards a contract for the erection of a structure of his, is conclusively presumed to have so contracted with reference to the law and to have voluntarily subjected his property to the rights thus given to material-men and contractors." *Hackfeld & Co. v. Hilo R. R. Co.*, 14 Haw. 448, 451. This court adopted in that case the views expressed on the subject by the supreme court of the United States and by other federal courts. "This argument rests upon a misconception as to the nature and character of a mechanics' lien. This lien is a creature of the statute, and was not recognized at common law. It may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. * * * Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material-man and laborer his lien under the statute. The lien is brought into operation by vir-

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tue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute." *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 136, "The validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice and most often administer an equity which has recognition under every system of law. That principle is that every one who by his labor or materials has contributed to the preservation or enhancement of the property of another thereby acquires a right to compensation * * *. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences of many creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the contract with the law before him the law enters into and becomes a part of the contract." *Jones v. Hotel Co.*, 86 Fed. 370, 385, 387. In the case last cited the court, referring to a lien in favor of sub-contractors arising under a Kentucky statute, repeated the following language which it had used in an earlier case: "It is not a lien originating in a contract for a lien but arises out of the statute independent of any agreement for a lien and is based upon the equity of paying for work done or materials delivered." See also *McMurray v. Brown*, 91 U. S. 257; *Hotel Co. v. Jones*, 193 U. S. 532; *Central Trust Co. v. R. R. Co.*, 68 Fed. 90; *Henry & Coatsworth Co. v. Evans*, 10 S. W. (Mo.) 868; *Bowen v. Phinney*, 162 Mass. 593, and *Cole Manufacturing Co. v. Falls*, 90 Tenn. 466. Pennsylvania cases in the main are relied upon by the defendant. These proceed upon the theory of agency and consent, above referred to, have been disapproved by the supreme court of the United States and are in conflict with the view already taken by this court in the two cases above cited as to the method of the creation of the lien and the theory upon which the law is to be upheld.

Under our statute a lien does not arise in favor of a mere

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trespasser and it is essential, therefore, to the creation of a lien that the improvement be authorized by the owner. When the owner grants such authority he acts with knowledge of and in reference to the provisions of our statute, makes those provisions a part of his contract and submits his property to the liens by the statute provided to compensate those who contribute material to its improvement. To avoid duplicating payments the owner may protect himself by requiring a bond from the original contractor, by dealing solely with those who are financially responsible, by withholding payment of the amount due to the contractor until after the expiration of the period within which notices of liens may be filed, or by other means. *Allen & Robinson v. Redward*, *supra*.

Under the view of the statute adopted by this court material-men are not chargeable with notice of provisions against liens contained in the original contract. Whether or not a material-man has waived the benefit of the statutory remedy or is estopped from asserting it is a question of fact to be determined in view of the circumstances of each particular case. "The lien for material such as the plaintiff advances is a strictly legal one, expressly given by the statute, and it ought not to be considered as waived or released except by plain acts." *Allen v. Lincoln*, 9 Haw. 364, 367. In the case at bar no waiver or estoppel is shown. The plaintiffs had no knowledge of the attempted restrictions in the contract and are not barred from enforcing the lien granted them by the statute upon the furnishing of the material. It may be added that the same conclusion was reached in *Miles v. Coutts*, 20 Mont. 47, 53. See also *Cost v. Hardware Co.*, 108 S. W. (Ark.) 509, 511; *Norton v. Clark*, 85 Me. 357, 359; *Brewing Co. v. Donnelly*, 59 N. J. L. 48, 50, and *Bates Machine Co. v. R. R. Co.*, 70 N. J. L. 684.

The reserved question is answered in the negative.

W. B. Lymer and A. L. Castle (*Thompson, Wilder, Watson*

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& Lymer and Castle & Withington on the briefs) for plaintiffs.

J. A. Magoon (Magoon & Weaver and N. W. Aluli on the brief) for defendant Mellie E. Hustace.

IN THE MATTER OF THE PETITION OF THE
TERRITORY OF HAWAII TO REGISTER AND
CONFIRM TITLE TO LAND.

RESERVED QUESTION FROM COURT OF LAND REGISTRATION.

SUBMITTED NOVEMBER 27, 1911.

DECIDED DECEMBER 1, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

COURTS—*stenographers, duties of.*

The attorney-general is not entitled to receive free of cost a transcript of the evidence and proceedings in a case tried in the court of land registration in which the Territory was a party by reason of the fact that the stenographer who reported the case was an official stenographer of the circuit court of the first circuit, such stenographer not having been assigned the duty of acting as such reporter under section 1692 of the Revised Laws.

OPINION OF THE COURT BY ROBERTSON, C.J.

It is shown by the record in this matter that the Territory of Hawaii made application to the court of land registration to register and confirm its title to certain land; certain persons claiming interests adverse to the Territory appeared and contested the application; answers were filed and the cause was set down for hearing; at the commencement of the hearing all parties requested the services of a stenographer, and thereupon P. Maurice McMahon an official stenographer of the circuit court of the first judicial circuit, was called and sworn "to serve and act as stenographer" in the cause; that the third judge of said circuit court was the duly appointed and acting judge of the

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court of land registration, having been designated as such by the chief justice pursuant to the provisions of section 2396 of the Revised Laws, as amended by Act 11 of the Session Laws of 1909; that at the conclusion of the hearing the court denied the petition of the Territory, whereupon the attorney-general noted and filed an appeal to this court and requested the entry of an order directing the stenographer to "prepare and furnish to the Territory of Hawaii, petitioner in the above entitled cause, a full and complete transcript of the evidence and proceedings in the above entitled cause without cost to the Territory."

The reserved question is thus stated: "Is the Territory of Hawaii, applicant in the above named cause, entitled to have and receive from P. Maurice McMahon Esq., without cost to it, for the purpose of its appeal, a transcript of the evidence and proceedings had upon the hearing of this cause?"

The statute establishing the court of land registration and providing for the appointment of a judge thereof (Act 56, Laws of 1903, R. L. Chap. 154) was amended in several particulars by Act 11 of the Laws of 1909. The amendatory act provided that a judge of the circuit court of the first circuit designated to so act by the chief justice of the supreme court shall be judge of the court of land registration, and that the clerk of the circuit court appointed by the circuit judge acting as judge of the court of land registration shall be *ex officio* registrar of the court of land registration.

The court of land registration has no official stenographer, and it appears to have been the practice in that court to employ stenographers as occasion required upon a per diem compensation. Section 1692 of the Revised Laws authorizes the first judge of the circuit court of the first circuit and the judges of the circuit courts of the other circuits to temporarily assign to any stenographer appointed by them respectively any appropriate duties in any court other than the one in which he is regularly employed. But the record before us contains no

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intimation that the stenographer referred to was assigned any duties in the court of land registration by either the first judge or the third judge of the circuit court of the first circuit.

The attorney-general states his contention to be that McMahon, in acting as stenographer in the court of land registration, was so acting as a regular salaried employe of the government; that the work he was doing was a part of the duties reasonably appropriate to his office as the stenographer of the third judge of the first circuit court; that the service rendered was to his employer, the government, and that his regularly appropriated salary is all the remuneration to which he is entitled for services rendered to the government in his office. He lays stress upon the fact that the circuit judge and circuit court clerk perform duties in the court of land registration without compensation other than their respective salaries as judge and clerk of the circuit court. And he cites the case of *In re Andrews*, 16 Haw. 483, wherein it was held that it is one of the duties of an official stenographer of a circuit court to furnish free of charge a carbon copy of the transcript of evidence to the attorney-general on the direction of the circuit judge in a proper case.

We regard that case as not in point. We think that, notwithstanding under the Act of 1909, a circuit judge is required to act as judge of the court of land registration and his clerk is to perform the duties of registrar, the court of land registration is just as separate and independent a court as it was prior to the passage of that act. A regularly appointed stenographer of the circuit court is under no obligation to perform duties as stenographer of the court of land registration, and only voluntarily would he act as stenographer in that court unless the duty to so act should be assigned to him pursuant to section 1692 of the Revised Laws. The question must be decided as though the judge of the court of land registration was not a circuit judge, and as though the stenographer employed in the case in question was not an official stenographer

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of the circuit court. The employment of a stenographer under such circumstances "to serve and act as stenographer" in a pending case, clearly, would not be understood by the stenographer or by court or counsel as contemplating the furnishing of a transcript of the testimony to the government free of cost. See *In re Peters*, 18 Haw. 659.

In this view it is obvious that it is no part of Mr. McMahon's duties as an official stenographer of the circuit court to furnish without compensation other than his salary as such officer a transcript of the testimony taken in a case in the court of land registration in which he happened to act as reporter.

The question reserved is answered in the negative.

A. Lindsay, Jr., Attorney-General, and A. G. Smith, Deputy Attorney-General, for the Territory.

E. C. Peters and F. Schnack for P. M. McMahon.

J. G. HENRIQUES *v.* CHRISTINA VINIACA, BANK
OF HAWAII, LIMITED, GARNISHEE.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

ARGUED NOVEMBER 20, 1911.

DECIDED DECEMBER 6, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

GARNISHMENT—*creditor—debtor—claim, unliquidated.*

Sec. 2114, R. L., limits the remedy of garnishment to actions brought by a creditor against his debtor. The relation of creditor and debtor necessarily implies the existence of a debt. A claim for unliquidated damages for breach of a contract to sell a lease is not a debt within the meaning of the statute, and garnishment can not be resorted to by the claimant.

CONTRACTS—*mutuality—consideration—option—offer and acceptance.*

Though the instrument sued upon in this case for the assignment of a lease, within a stated time, for a specified price, signed and delivered by one party to another, but wanting in mutuality, may not be susceptible of enforcement as a contract, or serving as a basis for damages for a breach thereof, and if without con-

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sideration is inoperative as an option, still, it is an offer to assign the lease, and if accepted and the price tendered before it is retracted, and within the time stated, such offer and acceptance constitute a valid contract.

PLEADING—as to defendant—as to garnishee.

A plaintiff may state a good cause of action against a defendant and fail to show facts sufficient to hold a garnishee, in which event the defendant would be put upon his defense and the garnishee would be discharged.

OPINION OF THE COURT BY DE BOLT, J.

The plaintiff filed his declaration in the circuit court of the third circuit seeking to recover from the defendant the sum of one thousand dollars unliquidated damages for the breach of an alleged contract of which the following is a copy: "I received from J. G. Henriques the amount of \$10.00 in account of the \$550.00, for the balance of the least of 7-1/2 acres of land that my husband leased from J. G. Henriques. Also all the improvements that is on the land. This is with the condition if the bargain that J. G. Henriques made with Nomura be settle. That is if Nomura take back his place again. Then the bargain that I made with J. G. Henriques be good. But if Nomura won't take back his place then I Mrs. Vinhaca have to return to J. G. Henriques the \$10.00. This option is good only for one month. Mrs. Christiana Vinhaca, her X mark."

To the plaintiff's declaration the defendant interposed a demurrer which the court sustained. The garnishee did not appear. The plaintiff brings the case here on exceptions.

The allegations of the declaration, so far as they are essential to a correct understanding of the questions involved, are, in substance, as follows: That in or about the year 1896 the plaintiff executed to one John Vinhaca, the husband of the defendant, since deceased, the lease in question, which is still in full force and effect; that in or about the year 1909, John Vinhaca died, and that ever since his death the defendant has

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assumed to own and deal with, and has in fact dealt with the lease and the land thereby demised, in all respects as though she was the owner of the lease, and the lessee in succession to her husband; that on October 24, 1910, the defendant signed and delivered the written instrument above set out to the plaintiff; that prior to the execution of the instrument mentioned, the plaintiff had entered into a contract with one Nomura, whereby the plaintiff might purchase and receive from Nomura an assignment of a certain lease held by him for certain land; that because of the advantages offered to the plaintiff in and by the instrument of October 24, 1910, the plaintiff, after the execution of the same, and prior to November 22, 1910, withdrew from and abandoned his contract with Nomura, and that by reason of so having abandoned the Nomura contract it became and was obligatory upon the defendant within one month from and after the execution of the instrument of October 24, 1910, and upon tender to her by the plaintiff of the sum of \$540, and upon request from the plaintiff, to execute and deliver to the plaintiff an assignment of the lease in question; that on November 22, 1910, the plaintiff tendered to the defendant the sum of \$540 and demanded that she execute and deliver to him the assignment of the lease mentioned, but that she declined said tender and refused to accept the same or any part thereof and refused and has ever since refused and still refuses to execute such assignment to the damage of the plaintiff in the sum of \$1000.

The declaration further alleges that the Bank of Hawaii, Ltd., the garnishee, is the attorney, factor or agent of the defendant and has in its hands certain of the goods, moneys and property of the defendant so concealed that the same cannot be levied upon by writ of attachment or execution against the defendant and that the garnishee is indebted to the defendant in a sum not certainly known to the plaintiff but believed by him to be the sum of \$800.

The plaintiff prays judgment for the sum of \$1000 and re-

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quests that there be inserted in the process to be issued the usual statutory direction to the officer serving the same to leave a true and attested copy thereof with the garnishee.

The grounds of demurrer are, that the alleged contract is unenforceable, (1) because the defendant was, within the knowledge of the plaintiff, without authority to make the same; (2) because of uncertainty and ambiguity; (3) because of the want of mutuality; (4) because of the want of consideration; (5) because of the failure of the plaintiff to perform all conditions precedent on his part; (6) because the property of the defendant in the hands of the garnishee is not subject to garnishment by the plaintiff in this action.

The decision of the court below, upon its face, purports to have sustained the demurrer on the sixth ground therein mentioned, namely, that the property of the defendant in the hands of the garnishee was not subject to garnishment by the plaintiff in this action, assigning as a reason for the ruling the fact that the amount sought to be recovered by the plaintiff was unliquidated. The plaintiff was granted leave to amend his declaration by striking therefrom all matter pertaining to the garnishment, but he declined to so amend, whereupon the court rendered its decision dismissing the entire cause of action and directed judgment to be entered for the defendant for costs, to which decision the plaintiff duly excepted.

The defendant now, in this court, urges other grounds of the demurrer, as well as the one upon which the court below apparently based its decision. The plaintiff opposes this position of the defendant and contends that the court below, by strong implication, if not expressly, overruled the first five grounds of demurrer, and that the defendant has no right to a review of the court's decision upon any of those grounds, they not being before us, as he claims, on the exceptions taken. The defendant contends, however, that under the authority of *Colburn v. Holt*, 19 Haw. 65, the plaintiff's exceptions must be overruled if any of the grounds of the demurrer are good,

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whether considered by the court below or not. The rule laid down in the case cited, the correctness of which we do not question, has no application in this case so far as regards the sixth ground of demurrer, which ground, in the view we take of the case, in no way involves the merits of the declaration as to the plaintiff's claim against the defendant. If the declaration states a good cause of action against the defendant, and for the purpose of considering the sixth ground of demurrer it must be assumed that it does so state a good cause of action, then it follows, necessarily, that the only question raised by the sixth ground of demurrer was the sufficiency of the declaration as to the garnishment. If this ground of demurrer was well taken, and we think it was, it required and could only justify the court in sustaining the demurrer as to the garnishment. The court had no right or power upon this phase of the case to rule upon the sufficiency of the declaration as regards the plaintiff's claim against the defendant. It is clear that a plaintiff may state a good cause of action against a defendant and fail to show facts sufficient to hold a garnishee, in which event the defendant would be put upon his defense and the garnishee would be discharged.

We cannot agree with the contention of the defendant that she has the right to have the action dismissed as to her also, because the garnishment was improperly made a part of the plaintiff's action. This view does not accord with reason. The authorities are against it. Drake on Attachment, §§411, 459a; 20 Cyc. 1101.

Whether the question as to the sufficiency of the garnishment may be raised by demurrer or should have been raised by a motion to discharge the garnishee, we need not say in this case, as counsel have not raised that question.

With regard to the remedy of garnishment, section 2114, R. L., so far as material in the consideration of this question, provides: "Whenever the goods or effects of a debtor are concealed in the hands of his attorney, agent, factor or trustee, so

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that they cannot be found to be attached or levied upon, or when debts are due from any person to a debtor, any creditor may bring his action against such debtor, and in his petition for process may request the court to insert therein a direction to the officer serving the same, to leave a true and attested copy with such attorney, agent, factor or trustee, or at the place of his or their usual place of abode, and to summon such attorney, agent, factor or trustee to appear personally upon the day or term mentioned and appointed in said process for hearing said cause, and then and there on oath to disclose whether he has, or at the time said copy was served, had any of the goods or effects of the defendant in his hands * * *."

The statute, as will be observed, limits the remedy of garnishment to actions brought by a "creditor" against his "debtor." The relation of creditor and debtor necessarily implies the existence of a debt. "In the strict sense of the word, a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence, debt is properly opposed (1) to unliquidated damages; (2) to liability, when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process. Debt denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment." *Davenport v. Kleinschmidt*, 6 Mont. 502, 536. The question thus presented is, whether the plaintiff's action against the defendant for the sum of \$1000, unliquidated damages, for breach of contract, is a debt?

The term "debt," as shown by an examination of the numerous authorities, has been differently defined, owing to the subject-matter of the statutes in which it has been used. 18 Cyc. 393, et seq.; 5 Ency. Pl. & Pr. 896.

Blackstone says, "The legal acceptation of debt is a sum of money due by certain and express agreement; as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specified,

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and does not depend upon any subsequent valuation to settle it." 3 Bla. Com. 154.

Ordinarily, a "debt" implies a sum of money owing upon a contract, express or implied. *Meriwether v. Garrett*, 102 U. S. 472, 513. In its more general sense it is defined to be that which is due from one person to another, whether money, goods, or services, and which one person is bound to pay to or perform for another. In ordinary parlance it means any claim for money, and a debt is properly said to be due, in the sense of owing, when it has been contracted and the liability of the debtor fixed.

In *Gray v. Bennett*, 3 Met. 522, 526, the court said: "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise."

In *Kellogg v. Schuyler*, 2 Denio 73, 74, the court said: "A cause of action in trespass is not a debt within the contemplation of the bankrupt act, and is not affected by a bankrupt discharge. The fact that a verdict had been rendered does not alter the case. Until judgment rendered there is no debt which is reached by the discharge."

In *Zimmer v. Schleehauf*, 115 Mass. 52, it was held that a claim for damages for slander and malicious prosecution was not a "debt" or "liability contracted" by the bankrupt, and was therefore not affected by a discharge of the bankrupt. The claim for damages was in suit when the proceeding in bankruptcy was commenced, and there had been a verdict for the plaintiff on which a judgment was given thereafter, but before the discharge. In delivering the opinion of the court Chief Justice Gray said: "A claim for damages in an action of tort does not become a debt by verdict before judgment."

In *Bolden v. Jensen*, 69 Fed. 745, the court said: "The word 'debt,' when used in a statute, without some plain or explicit declaration making it applicable thereto, does not include

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taxes nor claims for unliquidated damages. The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt."

In *City Council v. Dawson Waterworks Co.*, 32 S. E. 907, 912, the court said: "The word 'debt' is defined in various ways. According to the Standard Dictionary, it is 'that which one owes to another; any money, goods, or services that one is bound to pay to another; a pecuniary due.' 'A thing owed; obligation; liability.' Webst. Dict. 'A liquidated demand; a sum of money due by certain and express agreement.' And. Law. Dict.; 3 Bl. Comm. 154. 'All that is due a man under any form of obligation or promise.' Bouvier. From the foregoing definitions it is apparent that the word, when taken in a broad and comprehensive sense, includes any obligation to pay money, or other thing of value, that one is under to another, and arises the very moment that the obligation is undertaken, and continues until discharged by payment. Therefore, in this broad and comprehensive sense, if any time elapses between the performance of the service on the one hand, and the payment of the money or thing of value which the contract for that service calls for on the other, the relation of the parties to each other will be that of debtor and creditor, and the thing which is owed by one to the other will be a debt." See also *In re Adams*, 12 Daly 454; *Zinn v. Ritterman*, 2 Abb. Pr. N. S. 261.

Viewed in the light of the authorities cited it is obvious that the claim sued upon does not possess the requisite certainty, nor has it any of the essential elements of a debt. The claim itself does not furnish any standard or means of arriving at the liability, if any, of the defendant. It is purely speculative, uncertain and contingent. There is no way, other than the verdict of a jury, or other appropriate judicial procedure, whereby the amount of the defendant's liability, if any, can be determined. No person can calculate the amount for which a jury might return a verdict. Not until merged into a judgment can it be considered a debt. The claim is unliquidated and it

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furnishes no standard or means whereby it can be liquidated and made certain in amount.

The claim not being a debt it follows, therefore, that the legal duty, if any, to respond in damages for the alleged breach of the instrument sued upon in this action, does not create the relation of creditor and debtor between the plaintiff and the defendant, within the meaning of the statute, and that the plaintiff is not entitled to garnishment.

Inasmuch as the court below, not only discharged the garnishee, but also sustained the demurrer as to the plaintiff's claim against the defendant and directed judgment to be entered for the latter, and also in view of the fact that counsel in their briefs have argued other grounds of the demurrer, we deem it proper to consider the questions thus presented. The grounds of demurrer chiefly relied upon by the defendant are, that the alleged contract is wanting in mutuality and is without consideration, the contention being that the instrument, upon both grounds, is null and void. The instrument upon its face is not capable of enforcement by either party. It lacks mutuality and is without consideration. The language used is that of the defendant and she alone signed the instrument. Supporting the defendant's contention upon this phase of the case, the following authorities may be cited: *Johnson v. Robinson Mining Co.*, 5 L. R. A. 769; *Brown v. Starbird*, 56 Atl. 902; *Tucker v. Woods*, 12 Johnson 190; *Litz v. Goosling*, 21 L. R. A. 127; *Chicago & Great Eastern Railway v. Dane*, 43 N. Y. 240; *Richardson v. Hardwick*, 106 U. S. 252; *Vogel v. Pekoc*, 42 N. E. 386.

It will be observed, however, that the plaintiff in his declaration alleges that on November 22, 1910, within one month from the date of the execution of the instrument in question, he tendered to the defendant the sum of \$540 and demanded that she execute and deliver to him the assignment of the lease mentioned, but that she refused to do so. Though the instrument in question, for want of mutuality, may not be susceptible

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of enforcement as a contract, or serving as a basis for damages for a breach thereof, and if without consideration is inoperative as an option, still, it was an offer by the defendant to the plaintiff to sell and assign to him the lease for a specified price at any time within one month, and the offer having been accepted by the plaintiff before any attempt was made to retract it, and within the time stated, the acceptance being evidenced by, and accompanied with, the tender of the price and demand for the assignment of the lease, constituted a valid agreement. It is only stating an elementary proposition to say, that upon the acceptance of the offer, every element of a contract was then present,—parties, subject-matter, consideration, meeting of the minds, and mutuality. While it is true that the offer could have been withdrawn at any time before its acceptance, yet upon its acceptance as stated the minds of the parties met, and the contract was then complete and capable of enforcement. *Ide v. Leiser*, 10 Mont. 5, 10, 13; *The Boston & Maine R. R. v. Bartlett*, 3 Cush. 224; *Wilcox v. Cline*, 70 Mich. 517; *Houghwout v. Boisaubin*, 18 N. J. E. 318; *Cutting v. Dana*, 25 N. J. E. 265; *Perkins v. Hadsell*, 50 Ill. 216; *Sayward v. Houghton*, 119 Cal. 545; *House v. Jackson*, 24 Org. 89; 7 Am. & Eng. Ency. Law (2d ed.) 125, 138; 21 Am. & Eng. Ency. Law (2d ed.) 924 et seq.; Bishop on Contracts, §§77, 78; Clark on Contracts, p. 21 et seq.; Pomeroy on Contracts, §§59, 66.

We find no merit in any of the grounds of demurrer except in the sixth ground.

The exceptions so far as the plaintiff's claim against the defendant is involved are sustained, but as to the garnishment they are overruled.

C. W. Ashford for plaintiff submits the case on a brief.

J. P. Hewitt, Jr., (Carl S. Smith and S. S. Rolph with him on the brief) for defendant.

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EMMA A. DE FRIES v. S. M. KANAKANUI,
TRUSTEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 2, 1911.

DECIDED DECEMBER 11, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

LANDLORD AND TENANT—*summary possession—action purely possessory.*

Proceedings under R. L. §§2089 and 2090 are purely of a possessory nature and do not involve questions of title and their object is merely to put out of possession those who are in possession.

Id.—*parties defendant—sublessee in possession.*

In an action of summary possession of land under the statute a sublessee in possession is a necessary party defendant.

Id.—*parties plaintiff—grantee of lessor.*

A conveyance of leased premises carries with it the right to sue for the possession upon a forfeiture for breach of condition.

OPINION OF THE COURT BY PERRY, J.

This is an action for summary possession instituted in the district court of Honolulu and tried on appeal in the circuit court of the first circuit. One Heleluhe on April 12, 1906, executed a lease to the defendant of two parcels of land not adjoining each other for the term of twenty years, the lessee paying \$500 in advance in full for the whole term and further agreeing to pay all taxes for which the land or any part thereof might be liable during the term. The lease contained the usual clause authorizing the lessor upon breach on the part of the lessee of any of the covenants without notice or demand to enter upon the demised premises and thereby determine the lease and to remove, forcibly if necessary, the lessee or those claiming under him. On June 6, 1906, the lessee executed to one Yee Wo a sub-lease of one of the parcels of land. Heleluhe conveyed both parcels to the plaintiff by deed dated July 1, 1911. The taxes which accrued since the date of the orig-

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inal lease not having been paid by the lessee or any one under him, the plaintiff, after acquiring title, paid all of the taxes due and on July 24, 1911, served notice upon the defendant declaring the lease forfeited and demanding possession. In the month following the present action was instituted. These facts are undisputed. They appear in part from the evidence of the plaintiff herself and in part from evidence offered by the defendant and which to all intents and purposes must be regarded as having been admitted by the trial judge who held that the facts thus offered to be proven by the defendant did not constitute a defense and awarded judgment for the plaintiff for the possession of all of the land. The case comes to this court on the defendant's exceptions.

At the close of the plaintiff's case the defendant moved for a nonsuit on the ground, among others, "that the real party in interest has not been made a party defendant." This exception must, we think, be sustained. The action of summary possession provided for by our statute is possessory only and does not try the title. While it does not lie between parties other than those between whom the relation of landlord and tenant exists, it is equally essential to its maintenance that the person sued should be in the possession of the property involved. Section 2089, R. L., provides that "Whenever any lessee or tenant of any lands * * * or any person holding under such lessee or tenant, shall *hold possession* of such lands * * * without right, after the determination of such tenancy * * * the person entitled to such premises may be restored to the possession thereof in manner hereinafter provided"; section 2090 that "the defendant shall be summoned to answer the complaint of the plaintiff, for that the defendant *is in the possession* of the lands * * * and no other declaration shall be recognized," and section 2094 that "if the defendant shall be defaulted, or if on the trial it shall be proven to the satisfaction of the magistrate that the plaintiff is entitled to the possession of the premises, he shall have judg-

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ment for the possession thereof * * * and execution shall issue accordingly. The writ of possession shall issue to the high sheriff * * * commanding him to remove all persons from said premises, and to put the plaintiff or his agent into the full possession thereof." The only purpose of the proceeding is to put out of possession tenants who are in possession and thereby restore the possession to the lessor. It may become necessary incidentally in the trial of such cases to determine the issue, if it is raised, of whether the tenancy has terminated either by efflux of time or by reason of forfeiture, but this is merely incidental to the final and only relief concerning the possession. Aside from this, issues of title are not to be determined. In *Carter v. Wing Chong Wai Co.*, 12 Haw. 291, an action of summary possession under our statute, the original lessees, who were not parties, had assigned the lease and the assignees had in turn assigned to others, although by way of security only. The first assignees and the mortgagees were all made parties defendant. At the close of the plaintiff's case the defendants moved to dismiss the action as to the mortgagees on the ground of misjoinder, for the reason that they were not shown to be in possession. Upon exceptions to the overruling of the motion the court said: "It is contended on behalf of the plaintiff that inasmuch as the lease was assigned to Sing Chong & Co., although as security only, they must be held to have the legal title and to be liable as assignees, whether in possession or not, upon all the covenants that run with the land. * * * Let us assume that such is the law. It does not necessarily follow that a summary proceeding of this kind could properly be brought against them if they were not in possession. The lessees themselves, whether they had mortgaged their lease or not, would likewise be liable upon their covenants, but it would not necessarily follow that summary proceedings could properly be brought against even them if they were not in possession. The statute seems to contemplate not only that the relation

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of landlord and tenant should exist, but also that the tenant should be in possession. The proceedings are wholly statutory and may be pursued only so far as permitted by the statute. * * * No doubt the mortgagees are interested in the result, but the statute does not permit all persons in interest to be made parties, however desirable that may be; it permits those only to be made defendants who are in possession, for the proceeding is purely of a possessory nature and does not involve questions of title, and the object is merely to put out of possession those who are in possession. * * * But may not the mortgagees be joined as landlords with their mortgagors as tenants? In jurisdictions in which the action of ejectment may try the title to the land as well as the right of possession, landlords may be joined as co-defendants with their tenants, * * * and mortgagees and mortgagors have been regarded as holding the relation of landlord and tenant for such purposes. * * * But where ejectment is a possessory action only and does not try the title, landlords cannot properly be joined as co-defendants with their tenants, and if they are so joined a nonsuit may be granted as to them. * * * Summary proceedings under our statute are, as we have seen, merely possessory and would therefore seem to be analogous to those actions of ejectment which are merely possessory, in which landlords cannot properly be joined with their tenants." The law as there stated is applicable in the case at bar and requires that the sublessee in actual possession of the property be made a party defendant. Whether his landlord, the original lessee, is a necessary or even a proper party defendant need not be determined in this case, for he has been made a party and has raised no objection to the procedure followed. A judgment against the present defendant would not avail the plaintiff as against the sublessee. It may be that the latter, if joined, would have available to him one or more defenses not presented by the present defendant. Irrespective of whether the original lessee is properly in court the sublessee should certainly be

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made a party in order to render effective such writ of possession, if any, as may be issued in the cause.

The trial court found that in spite of the plaintiff's notice of determination of the lease the defendant "had continued in possession of said land and premises and was still holding the same against the plaintiff." We understand that by this reference was had to a constructive possession of the lessee through his sublessee, for the evidence on the point is undisputed.

The reasoning of the court in *Carter v. Wing Chong Wai*, supra, requires further a ruling in the case at bar, upon the evidence now before the court, that as to the other piece of land the plaintiff cannot in any event recover, for the reason that the defendant was not at the date of the institution of the action in possession and that the land was then and has been at all times since the date of the lease in the possession of one claiming adversely to the lessor. The remedy available under the statutory provisions here invoked being possessory only, no relief as to the second parcel can be had by the plaintiff against the defendant if the latter is out of possession.

It is also contended by the defendant that the plaintiff as grantee of the original lessor does not succeed to the lessor's right to reenter upon breach of condition. The law has been held to the contrary in *Henriques v. Paris*, 10 Haw. 408, where the court said "that a conveyance of leased premises carries with it the right to possession upon a forfeiture for breach of condition." Whether the right to which the grantee thus succeeds relates merely to breaches occurring after the date of the deed or as well to prior breaches is immaterial, for in the case at bar the breach was of a continuing nature. The taxes accruing after the date of the lease continued due to the government until paid and the failure to pay them constituted a breach of the lessee's covenant as long as that failure continued.

Upon the denial of the motion for a nonsuit the defendant offered to introduce certain evidence which was claimed by

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him to constitute a defense of waiver of the breach or of estoppel to claim it, and the trial court held that the evidence thus offered did not constitute a defense. In view of our conclusion that the cause cannot in any event proceed in its present condition as to parties, we deem it unnecessary to pass upon the question last mentioned. At a new trial one or more additional defenses may be presented which may prevail or additional evidence may be adduced tending to strengthen the defense of waiver and estoppel or these defenses may be found upon the evidence to be unfounded in fact.

The objection that the exception to the decision on the ground that it is contrary to the law and to the evidence is too general to permit of the consideration of any of the questions argued under it is not considered, since the exception to the denial of the motion for a nonsuit upon the ground of nonjoinder is beyond doubt sufficiently specific.

The exception to the refusal of a nonsuit is sustained and a new trial ordered.

L. Andrews (*E. Murphy* with him on the brief) for plaintiff.

W. A. Greenwell (*Castle & Withington* on the brief) for defendant.

J. W. A. REDHOUSE *v.* R. J. GRAHAM.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 6, 1911.

DECIDED DECEMBER 12, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

EVIDENCE—*absent witness*.

Testimony given at a former trial of a case by the plaintiff is not admissible in evidence at a subsequent trial of the case on the ground that the plaintiff is absent from the Territory, where it appears that he had ample time and opportunity to apply for

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a continuance, as well as to have had his testimony or deposition taken, but failed to do so.

ATTACHMENT—*Acts 52, 84, L. 1905.*

The affidavit required by Act 84, Laws of 1905, filed for the purpose of obtaining a writ of attachment, is not a compliance with Act 52, Laws of 1905, because the affidavit filed does not show, as Act 52 requires, "that all the goods have been delivered."

JUDGMENT—*no evidence—nonsuit.*

The plaintiff offering no evidence in support of his claim, the court should direct a nonsuit to be entered.

OPINION OF THE COURT BY DE BOLT, J.

The plaintiff brings this case here on exceptions from the circuit court of the first circuit. The action is in assumpsit and was instituted in the district court of Honolulu by the plaintiff to recover from the defendant the sum of twenty-five dollars, being the balance of the purchase price of a chronometer alleged to have been sold and delivered by the plaintiff to the defendant. The plaintiff verified his claim as required by Act 84, Laws of 1905, relating to attachments, and had certain personal property of the defendant attached as security for the satisfaction of such judgment as he might recover.

The plaintiff having recovered judgment in the district court on July 21, 1911, for the amount claimed, the defendant thereupon appealed to the circuit court, and on October 14, 1911, the case came on for trial *de novo* before the court, jury waived, and the parties appearing by their respective attorneys, it was shown by the testimony of Mr. T. M. Harrison, the plaintiff's attorney, that the plaintiff had left this Territory on September 10, 1911, on a sailing vessel bound for Hong Kong, where he would not arrive "until the latter part of this month"—October; that the plaintiff had no definite arrangement or intention of locating in Hong Kong, or in any other particular place, nor of returning to this Territory; that a few hours before leaving Honolulu he assigned the claim in question to his attorney, Mr. Harrison, but that for some time prior thereto he had re-

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fused to execute the assignment on the ground that he did not know whether he would leave the Territory or not before the case would come on for trial. The assignment was then offered in evidence on behalf of the plaintiff, to which the defendant objected; the objection was sustained and the evidence was rejected by the court on the ground that it was immaterial. We are thus presented with the novel situation of a plaintiff offering evidence showing that he has no claim against the defendant, to which offer of evidence the defendant objects. The plaintiff has no reason to complain of the ruling of the court upon this question.

Counsel then, because of the absence of the plaintiff (he having testified as a witness in his own behalf in the district court), offered to prove by the clerk of the district court and by his notes of the plaintiff's testimony taken as such clerk at the trial of the case in that court, and also by others who were present at the trial, what the plaintiff had there testified to. This testimony was also rejected by the court on the ground that no sufficient reason had been shown why the plaintiff could not have appeared in court and testified, or have had his deposition taken. It is clear that the court was right in rejecting the evidence offered for the purpose of proving the testimony of the plaintiff in the district court. It does not appear that any effort whatsoever was made at any time before the departure of the plaintiff from the Territory to have his testimony taken; nor was any application made to the court, either before or after his departure, for a continuance of the case until his return, or for any time, or for the purpose of having his testimony or deposition taken; nor is any sufficient reason given why his testimony or deposition was not taken; nor does there seem to have been any understanding, or arrangement, that after his departure, he would advise his attorney as to his whereabouts, or that he would give any further thought or attention to the case. Even though the case, under the provisions of Act 50, Laws of 1907, could not have been brought on for trial during the months of July

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and August, as counsel argues, still, this did not prevent the plaintiff from having his testimony or deposition taken to be used at the trial of the case when reached by the court. It is clear that the plaintiff has failed to avail himself of the various opportunities which were open to him to have had his testimony before the court, to say nothing of the unique position of a party to an action seeking to show his own unavailability as a reason for introducing secondary evidence. And in this connection we deem it proper to observe that Redhouse is the plaintiff in this action, notwithstanding the assignment offered in evidence and rejected by the court below.

The plaintiff also contends that he was entitled to judgment on the pleadings. He bases this contention on the fact that the affidavit filed for the purpose of obtaining the writ of attachment, was also a compliance with the requirements of Act 52, Laws of 1905, relating to suits on open accounts. We cannot accept this view. Act 52 requires that the affidavit shall show "that all the goods have been delivered." The affidavit filed does not show this fact, though the complaint, which was not sworn to in this respect, does allege the fact of delivery. Act 52 also provides that the defendant may make and file a counter affidavit to the plaintiff's claim. This is an important right, and to construe the affidavit filed as being a compliance with the requirements of Act 52, would operate, in effect, to deprive the defendant of this right to make his defense. Act 84, *supra*, under which the affidavit before us was made and filed, contains no such provision as to the right to file a counter affidavit as that of Act 52, and the defendant cannot be held to have contemplated the necessity of making and filing a counter affidavit as a defense upon the merits.

The plaintiff having no further evidence to offer, the defendant moved for judgment, and the only remaining contention of the plaintiff, which we are now required to notice, is, that the court, in response to the defendant's motion, erred in ordering, "that judgment be entered for the defendant against

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the plaintiff, that the plaintiff take nothing, and that the defendant recover from the plaintiff the costs of this action," instead of directing, as it is urged the court should have done, that a nonsuit be entered against the plaintiff. It is argued that the judgment ordered is an adjudication and could be pleaded in bar of another action brought upon the same facts between the same parties, or their privies. It will be observed, however, as we have already pointed out, that no evidence was introduced by either party as to the merits of the plaintiff's claim, and there was manifestly nothing to be submitted to the court for its consideration which in any way involved the merits of the case. When the plaintiff failed to go forward with his case, for lack of evidence, there was nothing for the court to do but order a nonsuit. The action of the court in ordering judgment to be entered for the defendant and against the plaintiff, purporting to adjudicate the case upon its merits, was error, but without prejudice to the plaintiff, as the record before us is clear that the court only directed the judgment to be entered because the plaintiff failed to introduce any evidence; and hence, the record upon its face is conclusive, that no issue of fact or of law was tried or adjudicated, and therefore, the judgment ordered cannot operate in bar to another action by the plaintiff. A judgment to be conclusive must be final upon the merits. It is obvious that the judgment ordered can only operate as a nonsuit. *Webb v. Wegley*, 125 N. W. 562, 565.

"The dismissal of a bill in equity, or of an action at law, not on the merits, but because plaintiff declines further prosecution of it, has no greater effect than a nonsuit, and is no bar to a subsequent suit founded on the same matters." 23 Cyc. 1151. See *Id.* 1136, 1139.

The exception taken to the ruling of the court in directing judgment to be entered for the defendant and against the plaintiff is sustained. All the other exceptions are overruled.

To obviate any future controversy which might arise as to the judgment which the court ordered to be entered, we deem

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it proper to direct the court below to enter a judgment of nonsuit.

T. M. Harrison for plaintiff.

R. W. Breckons for defendant.

JOHN G. MACHADO v. H. P. KAPULE KUALAU.

EXCEPTIONS FROM CIRCUIT COURT, THIRD CIRCUIT.

ARGUED DECEMBER 11, 1911.

DECIDED DECEMBER 13, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

BASTARDS—*capacity to inherit—from grandfather.*

In this jurisdiction an illegitimate child does not inherit from its grandfather.

OPINION OF THE COURT BY PERRY, J.

This is an action of ejectment. The facts are agreed upon by the parties and are as follows: That one Kualau died intestate, leaving surviving him a son, the defendant in this case, and one Kuanaulu, the illegitimate son of Kahalehau, a daughter who died unmarried prior to the death of Kualau Sr.; that Keone, another son of Kualau Sr., died unmarried and without issue prior to the death of his father; that Kualau Sr. was at the time of his death the owner of all of the land in controversy and that Kuanaulu conveyed all of his interest to the plaintiff. Upon these facts the trial court, jury having been waived, rendered a decision in favor of the plaintiff for an undivided one-half of the land. The defendant excepts.

By the common law of England an illegitimate was regarded as a child of no one and as incapable of inheriting from any one. 1 Blackstone, Commentaries, 459; 2 Kent, Commentaries, 212; 4 Kent, Commentaries, 413; *Pratt v. Atwood*, 108 Mass. 40; *McDonald v. Railway*, 144 Ind. 459. And it is

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well settled that in the absence of any language clearly expressing the contrary the words "child," "children" and "issue," and similar words descriptive of classes who are to inherit, do not, when used in statutes of distribution, include illegitimate children. *Hayden v. Barrett*, 172 Mass. 472; *Truelove v. Truelove*, 86 N. E. 1018; *McDonald v. Railway*, supra. Our statute provides that "property shall be divided equally among the intestate's children and the issue of any deceased child by right of representation." R. L. Sec. 2509. In its ordinary meaning, the word "issue" in this provision would refer to legitimate children only. Nor is there anything in our statutes to require or to justify any other construction. On the contrary sections 2511, 2287 and 2222 strengthen the view that the word is used in section 2509 in its ordinary acceptance. Section 2511 provides that "every illegitimate child shall be considered as an heir to his mother, and shall inherit her estate in whole or in part, as the case may be, in like manner as if he had been born in lawful wedlock." The enumeration of one excludes all others. The illegitimate is rendered by this section capable of inheriting from his mother, but not from any one else. Section 2287 specifically declares that illegitimates "shall not be entitled to inherit from their male parents without express bequest" and section 2222 provides that the child of a marriage, illegal because the husband had a former wife living at the time of contracting it, "shall be entitled to succeed in the same manner as legitimate children to all the real and personal estate of both parents in this Territory." In the instance last mentioned the inheriting capacity is conferred only under the circumstances and to the extent named. It is clear from all of these provisions that the legislature did not intend to alter the common law rule of incapacity any further than is specifically declared in the statutes.

In the case at bar the mother of the illegitimate left no property. The inheritance is not from her, but from her father, the patentee. The statute has given to the illegitimate the ca-

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capacity to inherit from his mother, but not from his grandfather.

The exceptions are sustained and the judgment set aside. Upon the agreed facts judgment should be entered for the defendant. It is so ordered.

J. Lightfoot for plaintiff.

W. C. Achi (*G. P. Kamauoha* with him on the brief) for defendant.

MARIA AIONA, NEE MARIA I, v. PONAHAHAWAI
COFFEE COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED DECEMBER 6, 1911.

DECIDED DECEMBER 15, 1911.

ROBERTSON, C.J., PERRY AND DE BOLT, JJ.

ADVERSE POSSESSION—*cotenants*.

One cotenant may, by an adverse holding of the common property, of which the other has notice, acquire title to the whole as against the ousted tenant.

APPEAL AND ERROR—*improper admission of evidence*.

A decision of the trial court in a jury-waived case which is amply supported by evidence will not be disturbed because of the improper admission of testimony when it appears improbable that such testimony influenced the conclusion arrived at by the trial court.

NEW TRIAL—*newly discovered evidence*.

A new trial will not be granted on the ground of newly discovered evidence where the evidence referred to was known to counsel before the trial was concluded.

OPINION OF THE COURT BY ROBERTSON, C.J.

This action of ejectment to recover an undivided one-half interest in a parcel of land situate at Mokuhonua, South Hilo (R. P. Grant 806, to Kukahauliakea), was commenced in the

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court below on February 21, 1911; was tried without a jury, and decided in defendant's favor.

It is undisputed that the title passed by inheritance to the patentee's daughter, Nahamali, who married I, sometimes known as I Pake, and had two daughters, both of whom survived her, Lilihana (or Liliiana) and Malia (or Maria), the plaintiff. Nahamali died in 1870 and her husband in 1877. The latter left a will wherein he purported to devise the land in dispute to his daughter Lilihana. At that time Lilihana was between ten and fifteen years of age while the plaintiff was younger.

After the death of I Pake the premises were occupied by an old Hawaiian couple for about five years, and following that they were vacant for a while. In the meantime the plaintiff and her sister lived at Puueo with a relative on premises which had been devised to the plaintiff by the will of her father. Later on, the plaintiff having married, Lilihana resided with her sister and brother-in-law. The plaintiff went with her husband to China in 1894 and returned in 1903. Lilihana died in 1903, shortly before her sister's return, having conveyed the land in dispute to the defendant's grantor by warranty deed on July 1, 1901.

Whether the Puueo premises, as well as those in dispute, formerly belonged to plaintiff's mother does not appear. Plaintiff seems to claim title to the Puueo land under her father's will. Neither was the basis of Lilihana's claim to the sole ownership of the land in dispute made clear, though one witness testified that Lilihana told her that the land had been willed to her.

The defendant claimed title as against the plaintiff by adverse possession upon evidence tending to show the following facts: In 1882 or 1883 Lilihana rented the land in dispute, except a portion of it which was occupied by one Luck Horn who had a store there, to one Lee Kai who planted vegetables on it for a period of fifteen months; in 1884 Lilihana leased

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to the Hilo Sugar Company a right of way for a flume over the land for the period of ten years at an annual rental, and at the expiration of the term, by mutual consent, without writing, the tenancy continued till 1903; in 1886 or 1887 one Ahuna, on behalf of the firm of Hop Yek Co., desiring to lease a piece of land for slaughter-house purposes, went to Lilihana, who was then living with the plaintiff, and asked her in plaintiff's presence who owned the land in question, Lilihana replied that the land belonged to her, whereupon terms for a lease were agreed to between Ahuna and Lilihana and a lease was drawn and executed accordingly whereby the premises were demised for the term of ten years at an annual rental of one hundred dollars which was paid semi-annually to Lilihana; at the conversation in which Lilihana told Ahuna that the land belonged to her the plaintiff remained silent; subsequently Lee Kai bought the Hop Yek lease and held the land till 1901, when he surrendered to Lilihana; in 1896 the Hilo Sugar Company paid Lilihana the sum of fifty dollars for the privilege of making a cut and changing the grade of its flume across the land; the books of the tax assessor from 1891 to 1898 showed that during that period the only land returned for taxation were the premises at Puueo, and that the taxes on the land in dispute were paid by Lilihana; and that on one occasion in 1894, during a quarrel between the plaintiff and Lilihana, at the Puueo residence, the plaintiff, in the presence of one witness told Lilihana that she did not want her to stay there and "to get out of there," to which Lilihana replied that she would go "when I sell my property and get the money," referring apparently to the land in question.

The plaintiff took exceptions to the court's allowing the manager of the Hilo Sugar Company to testify that at no time did he recognize the plaintiff as having any interest in this land; to the refusal of the court to strike out the answer of a witness that "most all the natives in Puueo talked that Maria owned the property in Puueo and Lilihana owned the prop-

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erty in Mokuhonua"; and to the court's allowing to be put to the same witness the question, "How long have you heard and known of its being reported generally that Lilihana owned the land in question?" The plaintiff also excepted to the decision of the trial court on the ground that it was contrary to the law and the evidence, and to the overruling of her motion for a new trial.

We will first consider the exception to the decision. Counsel for the plaintiff contends that the evidence was insufficient to show an ouster of Maria by her sister Lilihana, or an intention on the part of the latter to claim title or ownership of the disputed land to the exclusion of the plaintiff. The testimony was conflicting upon vital points. Had the court below believed the testimony given by the plaintiff its decision would undoubtedly have been in her favor. The decision not being in the record, we are not apprised of the reasoning by which the conclusion in defendant's favor was reached, but upon this exception we are obliged to take that view of the evidence which tends to support the decision. The evidence, a synopsis of which has been given, was sufficient to support a finding that Lilihana, through tenants, and her assigns, have held possession of the land continuously since 1883 or 1884, collecting the rents, and during a part of the time, at least, paid the taxes on the land; that her possession was under claim of sole and exclusive ownership; that the nature of her claim was made known to the plaintiff as long ago as the year 1887, and was again brought directly to her attention in 1894; and that the plaintiff made no claim to an interest in the land till after her return from China in 1903. Such a combination of facts is enough to rebut the presumption that the possession of one co-tenant is subservient to the others, and sufficient to uphold a finding that the possession so maintained has ripened into a complete title. *Smith v. Hamakua Mill Co.*, 13 Haw. 716.

Under the circumstances set forth it is immaterial whether Lilihana regarded her title as originating as an heir of her

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mother or as devisee under the will of her father. The effect of the evidence would be the same in either case.

The three exceptions to the admission of testimony are overruled. Assuming that there was possible error in that connection, we are satisfied that it was not such as would require the reversal of the judgment. It is unlikely that the testimony admitted over the plaintiff's objections had any influence on the conclusion arrived at by the trial court, which conclusion, as we have shown, is amply supported by the other evidence in the case.

One of the grounds for plaintiff's motion for a new trial was alleged newly discovered evidence. It was shown that during the trial of the case, after the plaintiff had rested and while evidence for the defendant was being received, plaintiff's attorney ascertained from one Forrest that he could testify that sixteen or seventeen years ago he offered to buy the land in dispute from Lilihana and that she then informed him that she owned only a one-half interest in the land. No attempt to introduce the testimony was made and the court's attention was not called to the matter until the filing of the motion for a new trial. The evidence was not newly discovered within the meaning of the rule. No error was committed in denying the motion. 29 Cyc. 883, 885.

Exceptions overruled.

A. G. Correa for plaintiff.

W. L. Stanley (*Holmes, Stanley & Olson* on the brief) for defendant.

AMENDMENTS TO RULES OF SUPREME COURT.

Rule 3, as amended May 31, 1911.

As to cases of reserved questions. In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purposes of this rule, be regarded as the appellant and his opponent as the appellee. So also where there are several questions and the one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some of them and the negative as to others, the plaintiff (or petitioner or movant) shall be regarded as the appellant and the defendant (or respondent) as the appellee, unless, upon application to the court, a special order shall be made.

Rule 11, as amended January 20, 1911.

In criminal cases the clerk shall forthwith issue the mandate upon the form being approved by one of the Justices.

Rule 13, as amended November 6, 1907.

No book, pamphlet or magazine shall be taken from the library of this court, except for use in a court room within the Judiciary Building, without the written permission of a justice of this court. Any person violating this rule shall be liable to suspension from the use of the library and shall make good all loss.

Rule 16, as amended October 5, 1908.

Unless otherwise directed by the court, regular examinations of candidates for admission to the bar will be held at Honolulu during the months of October and April.

Rule 18, prescribed October 18, 1910.

Petitions by any candidate directly interested or by thirty voters of any election district, setting forth cause why the decision of any board of inspectors of elections should be reversed, corrected or changed, shall be verified or supported by the affidavit of some person or persons having personal knowledge of the facts claimed to be ground for reversing, correcting or changing the decision.

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Judgment in an action of assumpsit for instalments of rent under a lease bars an action for the amount of sewer rates which accrued during the same period and which the lessees by the same instrument obligated themselves absolutely to pay. The right of action in such a case is single and indivisible. *Richards v. Ontai*, 335.

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ADVERSE POSSESSION.

1. *Cotenants.*

One cotenant may by an adverse holding of the common property, of which the other has notice, acquire title to the whole as against the ousted tenant. *Aiona v. Ponahawai Coffee Co., Ltd.*, 722.

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After a second verdict and judgment thereon, motion for a new trial and overruling of exceptions, it is too late to move for the first time for leave to amend the answer so as to plead the statute of limitations or to vacate the judgment on the ground that the cause of action is barred by the statute. *Dillingham v. Scott*, 4.

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In determining whether a verdict is sustained by the evidence, the appellate court will not consider the sufficiency or credibility of the evidence, but merely its legal effect upon the question in issue. *Territory v. Soga*, 75.

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The decision of a circuit court, jury waived, is equivalent to a verdict of a jury, and will not be disturbed on appeal, if supported by evidence. *Hau v. Palolo Land & Improvement Co.*, 172.

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A party who fails to object and except to an assumption or omission of certain facts by a trial judge in his instructions to the jury, and who fails to request other instructions on the

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An order of court will not be held final for the purpose of appeal because an adjudication of contempt for disobedience thereof, if made, would not be appealable. *In re Holt*, 255.

11. *Reserved questions on issues determined by inferior court.*

Where questions of law are reserved for the decision of the appellate court on the theory that the parties had presented all their claims and defences in the lower court, and that the decision of the appellate court should determine finally the issues between them, the defendant is precluded from questioning the finality of the decision, and the answers to the reserved questions will not be changed to allow further contentions to be raised. *Territory v. Tue Bun*, 273.

12. *Right of appeal from decision of boundary commissioner.*

At the hearing of a petition for the determination of the boundaries of certain land the Territory of Hawaii appeared and contested the boundaries as claimed by the petitioner. The issue of fact was tried at length, the parties producing at considerable expense all of the evidence known to them. Nearly four years later the commissioner filed his decision dismissing the petition "without prejudice, at the petitioner's costs," on the ground of failure of proof of petitioner's title to the land, the boundaries of which were sought to be adjudicated. Held, that the Territory was aggrieved, and had the right of appeal from the decision. *Re Boundaries of Kahua 2, Hilo*, 278.

13. *Boundaries—newly discovered evidence.*

In the supreme court, on appeal from a boundary commissioner, additional evidence may be admitted, even though strictly not

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"newly discovered" within the meaning of the law applicable to motions for new trials in ordinary cases. *Boundaries of Kahua 2, Hilo*, 278.

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Even though an instruction is ambiguous and misleading, the mere saving of an exception to it without request for further instructions, presents no error on appeal. *Territory v. Furo-mori*, 344.

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Ordinarily the inclusion in the record of a copy of the charge of the presiding judge to the jury is essential to the consideration of exceptions to the giving or the refusal of instructions. *Torson v. Beckley*, 405.

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While a judgment may, under some circumstances, be affirmed upon a ground other than that which influenced the trial court, the general rule is that an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken; and such rule will be applied where the ground relied on in the appellate court to support a judgment otherwise erroneous involves a question of fact not fully developed at the trial to which the attention of neither the trial court nor opposing counsel was called. *Unku v. Kaio*, 567.

20. *Exceptions in jury waived cases.*

The statute requiring that the decision in a jury waived case must be filed in writing, an exception to a so called oral decision is ineffective for any purpose.

In a jury waived case an exception to the judgment does not serve to bring up the merits of the decision.

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In a suit for specific performance of a contract to convey land, pending an appeal from the discharge of an order requiring the respondent to show cause why he should not furnish a release of an outstanding mortgage as well as a warranty deed, the fund deposited in court by the vendee for payment of the agreed purchase price should not be paid over to the vendor. *Frear v. Rosenbledt*, 682.

22. *Improper admission of evidence.*

A decision of the trial court in a jury waived case, which is amply supported by evidence, will not be disturbed because of the improper admission of testimony when it appears improbable that such testimony influenced the conclusion arrived at by the trial court. *Aiona v. Ponahawai Coffee Co., Ltd.*, 724.

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2. *Pending action—jurisdiction of court to order reference.*

In an action of law pending in one of the circuit courts of this Territory the court, without the aid of statute, has jurisdiction with the consent of the parties to refer the issues to arbitrators named by the parties, the stipulation further providing for the entry of the award as the judgment of the court. *Bruner v. Brewer & Co.*, 627.

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In such a case the reference to arbitrators does not of itself operate as a discontinuance of the cause and the judgment entered in pursuance of the stipulation and order of reference is valid. *Ibid.*

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Awards of arbitrators are generally regarded by courts with

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favor, and are not to be lightly set aside. *Bruner v. Brewer & Co.*, 627.

5. *Disqualification of arbitrator—evidence.*

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1. *Finding on the evidence.*

Upon the evidence in this case, the westerly, or mauka, boundary of the Ahupuaa of Kahua 2, in the district of South Hilo, Hawaii, is held to be at a point called Kananaka, and not at a point called Huinawai, or Nahuina. *In re Boundaries of Kahua 2, Hilo*, 278.

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2. *Delegation of powers.*

It is an established general doctrine of constitutional law that the power conferred upon the legislature to make laws cannot be delegated to any other authority. *McCandless v. Campbell*, 411.

3. *Taxing power—health regulations.*

The power of taxation may not be delegated to administrative officers. The power to enact health regulations having the force of law, may be delegated to municipalities and local boards of health. *McCandless v. Campbell*, 411.

4. *Taxation and regulation of business of emigrant agent.*

The business of emigrant agent is one which may lawfully be regulated as well as taxed.

Act 48 of the Session Laws of 1911, constitutes a lawful exercise by the legislature of the power of taxation, and of the police power, and so far as the petitioner in this case is in a position to raise constitutional objections to its validity, it is held to be not unconstitutional. *In re Craig*, 483.

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A contract between an attorney and client by which the attorney agreed to defend the client's title to land obtained at

CONTRACTS—Continued.

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2. *Duress—sewer rates.*

The defendant's agreement "to pay such rates annually for the use of the sewer as may be fixed," made with the Superintendent of Public Works, in order to obtain permission to connect premises with a public sewer, is enforceable under the decision in *Territory v. Brown*, 19 Haw. 41, for rates fixed prior to the Act of 1904 (Sec. 1036 R. L.), and is not made under duress by reason of a statement to the defendant by an inspector of the board of health that the defendant would be prosecuted for nuisance if he did not connect with the sewer. *Territory v. Tue Bun*, 268.

3. *Defense of illegality not available.*

The defendant having obtained permission to connect his premises with the public sewer upon his promise to pay the rates and having paid them for a year and a half without protest and stopped payment without any claim that the rates were illegal, and having continued the use of the sewer for his premises, is not in a position to assert the illegality of the rates or the unconstitutionality of the act under which they were fixed. *Territory v. Tue Bun*, 268.

4. *Sewer rates—legality of.*

A defendant's agreement, accompanying his application for permission to connect his premises with a public sewer, "To pay such rates annually for the use of the sewer as may be fixed," made with the Superintendent of Public Works, was not, prior to the Act of 1904 (Sec. 1036 R. L.), expressly authorizing such contracts, illegal, as beyond the general scope of the statutory duties and powers of the Superintendent. *Territory v. Tue Bun*, 268.

5. *Penalties—constitutionality of.*

Under Sec. 1038 R. L., providing that "If a sewer rate shall remain unpaid for fifteen days after it is due, ten per cent. in addi-

CONTRACTS—Continued.

tion to the regular rate shall be charged," the so-called "penalties," are simply additional charges prescribed to be paid in the event that the ordinary sewer rates are not paid within the time stated, and are a part of the sum agreed to be paid in the contract sued on. *Territory v. Tue Bun*, 273.

6. *Assignability.*

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7. *Employer—employee—partnership.*

An agreement whereby H. A. Co. hires W. to conduct a popularity contest, and as full compensation for his services W. is to have one-third of all moneys received from the sale of coupon tickets, does not constitute a partnership, but merely the relation of employer and employee. *Winkelbach v. Honolulu Amusement Co.*, 498.

8. *Mutuality—consideration—option—offer and acceptance.*

Though the instrument sued upon in this case for the assignment of a lease, within the stated time, for a specified price, signed and delivered by one party to another, but wanting in mutuality, may not be susceptible of enforcement as a contract, or serving as a basis for damages for a breach thereof, and if without consideration, is inoperative as an option, still, it is an offer to assign the lease, and if accepted and the price tendered before it is retracted, and within the time stated, such offer and acceptance constitute a valid contract. *Henriques v. Vinhaca*, 702.

See also MECHANICS' LIENS, 2.

COSTS.

1. *In actions against the Territory.*

Attorneys' commissions and fees are not recoverable against the Territory (following *Bowler v. Board of Immigration and Cleghorn, Collector of Customs, v. Luce*, 7 Haw. 715, 1889). *Lowrey v. Territory*, 112.

2. *Witness fees—defective service of subpoena.*

Mileage and witness fees are taxable as costs, even though the subpoena is served by an officer not authorized by law to serve it, provided the witness waived the defect, attended and testified. *Makekau v. Kane*, 203.

3. *Municipal officer exempt from.*

In causing the arrest and detention of the petitioner for a writ of habeas corpus, the respondent having acted, in good faith, in his official capacity as sheriff of the City and County of Honolulu, on behalf of the City and County, costs may not be taxed against the respondent even though the petitioner is ordered discharged from custody. *In re Jew Yuen Mow*, 359.

COSTS—Continued.

4. *Territorial officer exempt from.*

In proceedings instituted by one as superintendent of public works on behalf of the Territory, costs are not taxable against the plaintiff upon the sustaining of a demurrer on the ground that the Territory, and not the superintendent, should be the party plaintiff. *Campbell v. Steiner*, 455.

5. *Attorneys' fees—transcript of evidence.*

Money paid for a transcript of evidence necessary to the consideration of a bill of exceptions may, under R. L., Sec. 1889, be taxed as costs against the losing party. *Robinson v. Honolulu R. T. & L. Co.*, 467.

6. *Papers on appeal.*

Each original exhibit and each certified copy of a pleading on an appeal to this court is a "paper" within the meaning of paragraph 1, Sec. 1889, R. L., and is subject to a charge of twenty-five cents as costs. *Robinson v. Honolulu R. T. & L. Co.*, 467.

COURTS.

1. *Comment on evidence.*

It is not error for the court to rule in the presence of the jury that certain evidence is competent, relevant and material, or that the circumstantial evidence adduced is sufficient to require submission of the case to the jury. *Territory v. Pong Chong*, 225.

2. *Judicial notice of own records.*

The supreme court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. *Soga v. Jarrett*, 120.

3. *Opinions—written statement of reasons.*

The provision of R. L., Sec. 1747, as amended by Act 117 of the Laws of 1909, relating to a statement of the reasons for the decision of the trial court in jury waived cases is mandatory and the failure to comply therewith is reversible error. *Kahai v. Yee Yap*, 192.

4. *Jurisdiction—none, as to subject matter, by mere consent.*

A clause in the submission allowing an appeal from rulings of law cannot of itself give jurisdiction to this court where none is conferred by law. *Richards v. Ontai*, 198.

5. *Power to make rules.*

The rule of the circuit court of the first circuit which assigns all jury-waived cases to the third judge for trial is, if intended to deprive the other judges of jurisdiction to hear such cases, invalid. *Territory v. Kapiolani Est., Ltd.*, 548.

COURTS—Continued.

6. *Stare decisis.*

The court declines to consider *de novo* the question involving the construction of section 2513 R. L., decided in *Uuku v. Kaio*, ante, p. 567, nothing new or different having been advanced in the way either of argument or authorities. *Kaupena v. Kaio*, 653.

CREDITOR'S SUIT.

1. *Bill to set aside deed.*

D. filed her bill in equity, alleging that N. had executed to her two promissory notes; that N. conveyed his property to M. with the purpose to defraud her; that N. having died without any property subject to execution, she prayed that the deed be set aside, the property sold, and the proceeds applied to the payment of her notes.

Held, on demurrer by M., that a court of equity is without jurisdiction to recognize the promissory notes as a valid claim against the estate of N. *D'Herblay v. Macomber*, 274.

2. *Idem.*

A creditor who seeks to recover from the grantee of property which he alleges was fraudulently conveyed by the grantor before his death, the amount of a promissory note alleged to have been made by the grantor to the creditor, must first establish the validity of his claim against the decedent. *D'Herblay v. Macomber*, 274.

CRIMINAL LAW.

1. *Practise—counsel assisting prosecution.*

Unless otherwise directed by the attorney general a county attorney may consent to private counsel assisting the prosecution, his authority to give such consent being incidental to his statutory power to prosecute. *Territory v. Robello*, 7.

2. *Id.*

The attorney general may allow private counsel to assist prosecution. *Territory v. Soga*, 71.

3. *Practise—separate trials.*

It may be proper to grant a motion for a separate trial if seasonably made by defendants having antagonistic interests. *Territory v. Robello*, 7.

4. *Practise—change of venue.*

A motion for change of venue on the ground that extensive corporate and personal interests prevent a fair and impartial trial in the circuit is properly denied, there appearing to be no abuse of discretion. *Territory v. Robello*, 7.

5. *Practise—conduct of trial.*

A person representing the interests of the prosecution is allowed

CRIMINAL LAW—Continued.

during the trial to sit with the prosecuting officer. *Territory v. Robello*, 7.

6. *Conspiracy—acts constituting.*

Under sections 2703 and 3091, R. L., it is a criminal conspiracy for persons to confederate or mutually undertake to incite acts of violence and to threaten and intimidate laborers who would not strike for higher wages, or who wished to return to work. *Territory v. Soga*, 71.

7. *Conspiracy—evidence—order of proof.*

A mutual undertaking to arouse discontent of a certain class of Japanese laborers by speeches and newspaper articles tending to incite acts of violence in order to induce them to strike, is shown by, or may be inferred from, the evidence in this case. A mutual undertaking may be inferred from the conduct of the defendants, their mutual relations to each other with reference to a common object and by circumstantial evidence. The order of presenting proofs is immaterial. *Territory v. Soga*, 71.

8. *Conspiracy—evidence of intention.*

The intention and purpose of speeches and newspaper articles to incite to criminal acts of violence by threats and intimidation may be inferred from their nature; and the fact that such acts followed their utterance and publication tends to show that the language used in them was susceptible of such meaning in the minds of those whom they were intended to reach. *Territory v. Soga*, 71.

9. *Conspiracy—malice—proof of.*

Under an indictment for criminal conspiracy malice need not be specifically proven, but may be inferred from the nature of the contemplated wrong. *Territory v. Soga*, 71.

10. *Conspiracy—evidence—admissibility of.*

In a prosecution for criminal conspiracy, evidence of letters addressed to one of the defendants by Japanese in different parts of the Territory, applauding newspaper articles for which defendants were responsible, and urging violent methods for securing higher wages; and evidence of assaults by the Japanese upon other Japanese laborers is admissible as tending to show that the persons to whom the publications and speeches had been addressed were aroused thereby to urge the unlawful acts suggested by them. *Territory v. Soga*, 71.

11. *Conspiracy—arraignment on sworn complaint without indictment.*

A sworn complaint, charging the means of a conspiracy to be "By intimidating and threatening violence against, and inciting and instigating assaults and batteries" upon certain persons, "as well as to boycott financially and to ostracize socially,"

CRIMINAL LAW—Continued.

does not charge a felony, but a conspiracy in the third degree, which is a misdemeanor, and a defendant is not entitled, under the Fifth Amendment to the Constitution, to a presentment or indictment by a grand jury before trial therefor. *Territory v. Soga*, 71.

12. *Evidence—illegally obtained—admissibility of.*

Incriminating evidence of papers obtained from the possession of the defendants forcibly and without process of law is admissible. *Territory v. Soga*, 71.

13. *Evidence obtained illegally—constitutional rights.*

The admissibility of evidence is not affected by the illegality of the means through which it has been obtained. The admission of such evidence, if obtained without order or sanction of the court, violates no constitutional right. *Territory v. Furo-mori*, 344.

14. *Practise—continuance.*

It is not error to refuse a continuance of two days in which to plead. *Territory v. Soga*, 71.

15. *Constitutional—waiver by statutory authority of the full legal number of twelve jurors, and consenting to withdrawal of one juror.*

Such waiver is not in conflict with Article Three of the Constitution, the Fifth and Sixth Amendments, or Article 83, Organic Act. *Territory v. Robello*, 7.

16. *Withdrawal of plea of guilty.*

An application for leave to withdraw a plea of guilty is addressed to the sound discretion of the trial court, and the appellate court cannot interfere in the absence of abuse of discretion.

Upon the evidence in this case the magistrate is held not to have committed an abuse of discretion. *Territory v. Chamberlain*, 103.

17. *Appeal—refusal of leave to withdraw a plea of guilty.*

Where a defendant who, in a criminal prosecution, pleaded guilty, and judgment and sentence were rendered, later presents a motion for leave to withdraw his plea and enter a plea of not guilty, which motion is denied; his failure to appeal from the original judgment and sentence, does not deprive him of the right of appeal from the refusal of leave to change his plea. *Territory v. Chamberlain*, 103.

18. *Trial—statutory offence—evidence.*

Where in a statute relating to gambling offences, each section is complete in itself, defining a specific offence, the penalty being provided for by one general section, on a charge for the violation of one section, a conviction cannot be had solely upon evi-

CRIMINAL LAW—Continued.

dence of the violation of another section. *Territory v. Furo-mori*, 344.

19. *Charge—furnishing opium—evidence.*

Where the defendant is charged with the offence of furnishing opium to another in violation of the statute, and the evidence shows a sale and delivery of the opium by the defendant to another, a conviction of the defendant by the district magistrate must be sustained. *Territory v. Hu Seong*, 669.

CROSS EXAMINATION.

See TRIAL, 12.

DAMS.

See WATERS AND WATERCOURSES, 1.

DAMAGES.

1. *Punitive—when recoverable.*

Punitive damages are recoverable in actions of tort when the defendant's misconduct has been wilful or when he has acted with a reckless indifference to the rights of others. *Bright v. Quinn*, 504.

DECISION.

See ELECTIONS, 1, 2, 3, 4.

DECISION, JURY WAIVED.

See APPEAL AND ERROR, 6.

DECREE.

See EQUITY, 4; JUDGMENT, 7.

DEEDS.

1. *Construction.*

The common law rule, approved herein, is that "In case of a clear repugnancy between the premises and the habendum, the premises will prevail to the extent that an estate created in the granting clause cannot be cut down or invalidated by limitations in the habendum." *Simerson v. Simerson*, 57.

2. *Estates—conditions in restraint of alienation.*

A deed conveying "absolutely" to A. "and her heirs forever" reserving all rights and income for lives of grantor and wife upon condition that grantee "cannot" sell or mortgage, and that after her death the land "is to descend" to her son and any after born children "and their heirs and assigns forever," gives the grantee the fee which is not reduced to a life estate by the condition against alienation. *Simerson v. Simerson*, 57.

3. *Construction—trusts.*

A deed by E. to C. and N., conveying land to them in trust for the use of E. until her marriage with H., and after the

DEEDS—Continued.

marriage to pay the net income to her during her coverture with H., and in case of her death after her marriage and during the lifetime of H., leaving issue of the marriage, to apply the net income to the maintenance of such issue during minority, and upon such issue attaining majority to convey the land to them: Held, H. having died in the lifetime of E.,—that the possibility of such issue acquiring an interest in the land entirely vanished upon the death of H. *Nahaoiehua v. Heen*, 372.

4. *Construction.*

C. and N. executed a deed of land to E. "and to the heirs of her body . . . to have and to hold the same to the said E. . . . and to the heirs of her body forever. In special trust for the use and benefit of her son K., and such other child or children as may hereafter be born to her, and his or their assigns forever as they shall arrive at the age of legal majority." Held,—that under the circumstances this deed conveyed a life estate to E., remainder in fee simple to her children, and the statute of limitations would not begin to run in favor of persons in adverse possession until the mother's death. *Nahaoiehua v. Heen*, 372.

5. *Construction of, by parties.*

The rule that where the language of a deed is ambiguous and a certain construction has been given to it by the parties themselves, that construction will be accepted as the true one unless it contravenes some rule of law, does not apply unless all the parties interested participated in such construction. *Nahaoiehua v. Heen*, 613.

6. *Trusts—revocation.*

A conveyance in trust, although the deed contains no express power of revocation, may be revoked by the consent of all parties in interest. *Nahaoiehua v. Heen*, 372.

See also EVIDENCE, 18.

DEFAULT.

See JUDGMENT, 6.

DELEGATION OF POWERS.

See CONSTITUTIONAL LAW, 2; TAXATION, 3.

DEMURRER.

1. *Effect of to conclusion of law.*

A demurrer to a petition which alleges that a statute or a portion thereof is unconstitutional, does not bind the court. *McCandless v. Campbell*, 404.

DESCENT AND DISTRIBUTION.

1. *The word "children" in statute including grandchildren.*

Under the "General rules of descent," Sec. 2509 R. L., the word

DESCENT AND DISTRIBUTION—Continued.

"children" includes grandchildren in the clause providing that "if the intestate be a woman and shall leave no issue nor father nor mother her estate shall descend one-half to her husband and the other half to her brothers and sisters and to the 'children' of any brother or sister by right of representation." *Kahananui v. Maunakea*, 114.

2. "Ancestors," under Sec. 2513 R. L.

The word "ancestor" in the proviso of section 2513 R. L., embraces all persons from whom a title by descent could be derived under any circumstances.

The ancestor from whom "the inheritance came" is the person from whom it *immediately* passed, and not the remote source of the gift. *Uuku v. Kaio*, 567.

3. *Deed from wife—kindred of half blood not excluded.*

A., the wife of K., for a nominal consideration conveyed to M. certain land which M. thereupon conveyed to K., the intestate. M. and K. were not related to each other by blood or marriage. Held, that the alleged gift "came" to K. from M., and not from A., and that the children of P., a deceased half brother of K. and not of the blood of A., were not excluded by the provisions of section 2513, R. L., from inheriting the land of K. *Uuku v. Kaio*, 567.

DILIGENCE.

See NEW TRIAL, 3.

DIRECTED VERDICT.

See EVIDENCE, 1; NEGLIGENCE, 1.

DISMISSAL AND NONSUIT.

1. *Proof of title in boundary case.*

In the petition, the applicant alleged title in itself. This allegation was not disputed and the trial was conducted on the theory that the applicant had title. Under these circumstances the commissioner may not, of his own accord and without giving opportunity to the parties to cure the supposed defect, dismiss the petition on the ground of failure of proof of title. *In re Boundaries of Kahua 2, Hilo*, 278:

DIVORCE.

1. *Jurisdiction—time of hearing.*

Circuit judges are without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee, in whatever method service may be accomplished, or after appearance without service. *Markle v. Markle*, 633.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 1.

DURESS.

See CONTRACTS, 2.

EJECTMENT.

See PLEADING, 5; TENANCY IN COMMON, 4.

ELECTION.

See PLEADING, 4.

ELECTIONS.

1. "Decision" by inspectors—meaning of.

A "decision," within the meaning of sections 56 and 57, R. L., may be made, in proper cases, before as well as after the ballots are physically in the box. *Lane v. Fern*, 290.

2. What constitutes a "decision" by inspectors.

The mere acceptance and the counting of ballots marked and cast after five o'clock on election day constitute "decisions" within the meaning of sections 56 and 57 of Act 118. *Lane v. Fern*, 290.

3. *Id.*

The mere acceptance and the counting of ballots exhibited to others by voters after marking and before casting them constitute "decisions" within the meaning of the sections named, at least if the exhibiting was seen by or known to the inspectors at the time of the occurrence or before such acceptance and counting, and perhaps, also, even if the exhibiting was not thus seen or known. *Lane v. Fern*, 290.

4. *Id.*

The mere acceptance and the counting of ballots unlawfully exhibited by voters constitute "decisions" within the meaning of sections 56 and 57 of Act 118, L. 1907, irrespective of whether the exhibiting was seen by or known to the inspectors prior to the acceptance or counting. *Lane v. Fern*, 322.

5. Question "as to the validity" of ballots.

Whether a ballot marked and cast after five o'clock on the afternoon of election day, and whether a ballot wilfully exhibited by a voter to another, after marking and before casting it, should be rejected or counted by the inspectors are, within the meaning of section 56, Act 118, Laws of 1907, questions "as to the validity" of the ballot, within the power of the inspectors to decide and of this court to review on a contest under section 57 of that Act. *Lane v. Fern*, 290.

6. Ballots cast after 5 p. m. valid.

Ballots otherwise valid are not rendered invalid by the mere fact that they were prepared and cast between 5 p. m. and 6:30 p. m. on election day. *Lane v. Fern*, 290.

ELECTIONS—Continued.

7. *Exhibited ballots invalid.*

Ballots wilfully exhibited to others by the voters after marking and before casting are invalid. Whether the inspectors and this court have jurisdiction to so determine (on a contest) with reference to ballots the exhibiting of which was not known to the inspectors, is not decided in the case. *Lane v. Fern*, 290.

8. *When a ballot is cast.*

Within the meaning of Sec. 56 of Act 118, Laws 1907, providing that "all questions as to the validity of any ballot cast . . . shall be decided, etc., . . ." a ballot is cast when the voter has exhausted all reasonable efforts to have it placed in the ballot box. *Lane v. Fern*, 290.

9. *What is a "question."*

The word "questions" used in Section 56 of Act 118 does not refer to issues expressly raised at the polling places on election day by the candidates or their representatives, but to issues capable of being raised although not raised. *Lane v. Fern*, 290.

10. *Causes of invalidity of ballots.*

The word "hereof" in subsection 5 of Section 94, R. L., does not refer to the section itself, but to all of the Rules and Regulations for Administering Oaths and Holding Elections promulgated by the President of the Republic in 1894, and now included in chapters 7, 8 and 9, R. L. It refers not only to improper marks on the face of the ballot but also to other causes of invalidity. *Lane v. Fern*, 290.

11. *Validity of—interference with voters.*

The fact that at an election, while voters were in the polling booth, marking their ballots, one M., not an election official, handed pencils to voters and tried to induce them to vote for certain candidates, and that one W., not an election official, also "instructed" and urged a number of electors to vote for the same candidates, does not, of itself, render the election invalid. *Lane v. Fern*, 290.

12. *Exhibited ballots—validity of.*

In order to render, under R. L., Sections 87 and 88, an exhibited ballot invalid, it is requisite that the ballot be exhibited wilfully to another after it has been marked, and that the person to whom it is exhibited see its contents so as to be informed thereby for whom it is cast. *Lane v. Fern*, 322.

13. *Right to contest.*

The right to contest an election is purely statutory. What constitutes a cause of contest is a question to be determined in accordance with the statutes of the jurisdiction in which the question is raised. *Lane v. Fern*, 290.

ELECTIONS—Continued.

14. *Exhibition of ballots—pleading.*

The mere allegation in a petition contesting an election on the ground of illegal exhibition of ballots by voters, that the ballots "were openly and wilfully and carelessly exhibited," is insufficient on demurrer, there being no allegation that the ballots were exhibited after being marked, or that others saw them and the marks thereon so as to be informed thereby for whom the exhibited votes were cast. *Lane v. Fern*, 322.

15. *Pleading—amendment—parties plaintiff.*

After the expiration of the time limited by statute for the bringing of election contests a petition by thirty voters, one or more of whom have discontinued, may not be amended by adding the names of new parties plaintiff. *Bright v. Fern*, 325.

16. *Practise—withdrawal of petitioners—effect of.*

In an election contest brought by thirty voters under Section 56 of Act 118, L. 1907, any one or more of the petitioners may withdraw as such, at least before answer filed and with leave of the court, subject only to an appropriate order as to costs. In that event the contest may not be maintained by the remaining petitioners. *Bright v. Fern*, 325.

EMBEZZLEMENT.

1. *County employe—second clerk of district court of Honolulu—indirect consent of county to entrusting him with bail money.*

Bail money forfeited in the district court of Honolulu belongs to the county, and when collected by the second clerk of the district court, appointed by the magistrate and by him charged with the duty of collecting, is subject to embezzlement by the clerk as a county employe entrusted with the custody of the money by the indirect consent of the county.

The second clerk is properly appointed by the magistrate and not by the mayor under the provision in the County Act for the appointment of county officers, and may be lawfully charged by the magistrate with receiving bail moneys. *Territory v. Clark*, 391.

EMINENT DOMAIN.

1. *Pleading—proper plaintiff.*

A proceeding under Ch. 40, R. L., to condemn land for a public highway should be brought in the name of the Territory and not of the Superintendent of Public Works. *Campbell v. Steiner*, 365.

2. *Practise—map must accompany the petition.*

Under Sec. 499, R. L., providing that "a map must accompany the complaint, which shall correctly delineate the land sought to be condemned, and its location," it seems that a copy of the map must accompany each copy of the complaint served. *Campbell v. Steiner*, 365.

EMPLOYER AND EMPLOYEE.

See CONTRACTS, 7.

EQUITY.

1. *Accounting by administrator.*

Where plaintiffs seek not merely to obtain an accounting from an administrator, but also to protect their mortgage lien on the property of the deceased mortgagor or its proceeds in the administrator's hands, and in addition allege a conspiracy between the administrator and the second mortgagee to deprive plaintiffs of their lien, equity has jurisdiction to compel an accounting by the administrator. *Castle Est. v. Haneberg*, 123.

2. *Presentation of claim to administrator.*

Presentation of a claim to an administrator does not of itself operate as a waiver of a lien upon the estate of the decedent. *Castle Est. v. Haneberg*, 123.

3. *Principal and agent—accounting—money had and received.*

Where an agent receives money for his principal as the proceeds of the sale of certain mining stock of the principal's, and fails to remit the same, but permits it to be garnisheed in his hands for certain debts alleged to be due by his principal to third persons, a bill in equity against the agent and said third persons for an accounting, setting out no facts showing either insolvency, a trust relation and violation of the same, or fraud or collusion, is not proper, there being a plain, adequate and complete remedy by an action at law for money had and received. *Herbert v. Henry*, 186.

4. *Decree.*

A decree bearing date July 1, but signed and filed on July 7, takes effect on the latter date and not before.

If the form of decree was actually signed on July 1, but not filed until July 7, it did not take effect as a decree until the latter date. *Sumner v. Gear*, 219.

5. *Appeal.*

An appeal filed on July 5, purporting to be from a decree rendered on July 1, but which decree was not signed and filed until July 7—at least not filed until the latter date—was premature and invalid. *Sumner v. Gear*, 219.

6. *Judgment—nunc pro tunc.*

Though the power to enter judgments, decrees and orders, *nunc pro tunc* in furtherance of justice is inherent in the courts both at law and in equity, yet before one may invoke the exercise of this power, he must show affirmatively that the delay was caused either by the court or by the opposite party. *Sumner v. Gear*, 219.

EQUITY—Continued.

7. *Payment of claim a charge on trust fund—not barred by lapse of time.*

H., owner of an interest in land, subject to dower of L., in the entire land, mortgaged her interest to S. Suit was brought to partition the land, H., L. and S. being made parties. The court, by consent of all the parties, ordered the land sold and decreed that two thirds of the proceeds be divided among the parties, the share of H. to be applied in part payment of the claim of S., and the remaining one third to be invested by a trustee, the income to be paid to L. during her life, and at her death the trust fund to be divided in the same manner the two thirds had been, the share of H. to be charged with the payment of S.'s claim. The decree was entered Aug. 16, 1882. L. died June 17, 1908. This suit was begun Apr. 16, 1910.

Held—that the claim against the trustee was not enforceable until the death of L., and that it is not barred by lapse of time. *Segelkin v. Hawaiian Trust Co.*, 225.

8. *Res judicata.*

A decree of the court of land registration that the grantees named in a deed were the owners of the land therein described, is a bar to a bill to reform the deed alleged to have been executed by the grantor by mistake, and in consequence of the fraud of one of the grantees. *Pahao v. Swinton*, 355.

9. *Cloud upon title—boundaries.*

Mere confusion of boundaries resulting from an overlap by two patents is not sufficient to give a court of equity jurisdiction to establish boundaries. There must be some special equity. A bill to remove a cloud by settling boundaries cannot be sustained under circumstances under which a bill to settle the boundaries could not be sustained. *Downey v. Silva*, 361.

10. *Jurisdiction—constructive service.*

Sec. 1840, R. L., which authorizes constructive service upon non-resident defendants in suits in equity is valid and operative only in those cases in which equity has jurisdiction according to the general principles of equity to proceed in matters in which the decree may operate directly upon property. *Borges v. Encarnacao*, 638.

11. *Removal of cloud—remedy in personam.*

In the absence of statute a court of equity has no inherent power by the mere force of its decree to annul a deed or to establish a title.

The relief sought in this case being the removal of a cloud upon title by the delivering up and cancellation of an alleged fraudulent deed is purely in personam, and jurisdiction of the

EQUITY—Continued.

person of the defendant, a non-resident, cannot be acquired through service by publication. *Borges v. Encamacao*, 638.
See also CREDITOR'S SUIT, 1, 2; PLEADING, 2, 9.

ESTATES.

1. *Merger.*

If one holds an estate for life or for years, and also the fee, the former estates merge in the fee. *Simerson v. Simerson*, 57.
See also DEEDS, 2.

ESTOPPEL.

See JUDGMENTS, 5.

EVIDENCE.

1. *Directed verdict.*

The evidence in this case held to require submission of the case to the jury. Directed verdict set aside. *Campbell v. Hackfeld*, 33.

2. *Supports findings.*

There was evidence in this case to sustain the findings of the trial court. *Miller v. Charman*, 165.

3. *Sufficient to support verdict.*

Upon the evidence in this case a motion for a directed verdict held to have been correctly denied. *Makekau v. Kane*, 203.

4. *Sufficient to support verdict.*

To sustain a conviction under Sec. 3175 R. L., making it a criminal offence to be present where "any game of faro, monte, roulette, tan, fan tan, or any banking or percentage game with cards, dice, or any devices for money, checks, credits, or any representative of value, or any other game in which money or anything of value is lost or won, is being carried on," it is not necessary to show that the game was a banking or percentage game, it being sufficient to show that a game was being played at which money was lost and won. *Territory v. Apoliona*, 109.

5. *Supports findings.*

In an action of trespass on the case for injuries to plaintiff's land and crops and trees, caused by the breaking of a dam constructed and owned by defendants, evidence was introduced tending to show that the dam was not properly constructed, and that in consequence of its negligent, defective and improper construction, the dam suddenly broke, and an immense volume of water rushed down the bed of the stream upon plaintiff's land, and that the value of the trees and crops destroyed, and the expense of restoring the land to its original condition would exceed the amount actually awarded by the court.

Held—on appeal, that there was ample evidence to support the findings of the court. *Hau v. Palolo Land & Imp. Co.*, 172.

EVIDENCE—Continued.

6. *Sufficient to support verdict.*

In a prosecution for being present at a place where a game at which money was lost and won was being played, it is not necessary, in order to sustain a conviction that any witness should state specifically that money which was passed between the defendants was passed as a part of the gambling game. Where a portion of the evidence was to the effect that some of the defendants with others were on or near a bunk in a room, holding cards in their hands, and that money passed from one holding cards to another holding cards, other evidence being that some of the defendants placed money on their cards, such evidence was sufficient to justify reasonable men in finding that the money was passed as part of the gambling game, and not in payment for an ordinary obligation. *Territory v. Nakamura*, 222.

7. *Supports verdict—inferences.*

There being evidence of certain facts, if believed by the jury, from which facts inferences of guilt could reasonably have been drawn by the jury, the verdict cannot be set aside. *Territory v. Pong Chong*, 225.

8. *Reasonableness of attorney's fees.*

The reasonableness of fees charged by an attorney must be shown by evidence in addition to a showing of the kind of service performed. *Van Gieson v. Magoon*, 146.

9. *Declarations concerning pedigree.*

Declarations of deceased persons who were *de jure* related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Makekau v. Kane*, 203.

10. *Relationship of declarant.*

A qualification of the rule is that before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself, but such proof may be slight. *Makekau v. Kane*, 203.

11. *Order of proof.*

The mere order of proof is immaterial. That is a matter resting largely in the discretion of the trial court. *Makekau v. Kane*, 203.

12. *Declarations not secondary evidence.*

If the declarant is dead, the declarations are not to be excluded merely by reason of the fact that living members of the same family can be examined on the same point. *Makekau v. Kane*, 203.

13. *Narration of past events, inadmissible.*

A mere narration of past events, not against interest, though made by a claimant while in possession of the land in contro-

EVIDENCE—Continued.

versy, is but hearsay and not competent to be proven. *Makekau v. Kane*, 203.

14. *Receivable only to give character to possession.*

The doctrine that self-serving declarations of a claimant to land are admissible assumes that the declarations were made while the declarant was in possession of the land, and that they are not offered except as coloring the occupation and showing that it was hostile. *Makekau v. Kane*, 203.

15. *Agreement to reduce rent under a lease.*

In an action for rent, it was admitted that defendant was the holder of a written lease from plaintiff, at a reserved rental of \$55 per month and having 16 years to run. Defendant testified that upon his representing to the plaintiff that because of hard times he could not pay more than \$40 per month, plaintiff agreed to reduce the rent to that amount. Plaintiff testified that he agreed for the time being to help defendant out. Held, that although the evidence was contradictory, in view of the fact that the lease had still 16 years to run, there was evidence to justify the lower court in finding that the reduction in rent was only temporary. *Vivichaves v. Akau*, 217.

16. *Admissibility of evidence illegally obtained.*

An illegal method of obtaining evidence does not render it inadmissible. *Campbell v. Hackfeld & Co.*, 245.

17. *Assumpsit—burden of proof.*

In assumpsit for money had and received from sales of plaintiff's cattle, the burden is upon the plaintiff to prove the essential facts by evidence sufficiently clear and satisfactory to enable the jury to intelligently make the necessary findings. *Lyons v. Maciel*, 378.

18. *Deed—statement in, as to grantor's title.*

Statements in a deed as to the title claimed by the grantor do not render it inadmissible for the purpose of showing the defendants' claim in a defense of title by adverse possession. *Apana v. Kapano*, 399.

19. *Spontaneous exclamations—statement of opinion.*

In an action for damages for negligence in the operation of an automobile, testimony was offered tending to show that one who witnessed the collision exclaimed shortly afterward that (referring to the plaintiff), "It was all his own fault, and if he had taken our advice, and had been careful, the accident would not have happened."

Held—that even though in other respects admissible, the statement was the expression of the mere opinion and conclusion of the declarant, and was therefore inadmissible. *Torson v. Beckley*, 405.

EVIDENCE—Continued.

20. *Cross-examination of interpreter.*

The right to subject an interpreter, on the witness stand, to cross-examination on the foreign expressions and terms used by him as interpreter, or used by the witness for whom he has acted as interpreter, is a right well recognized by law, and is founded upon the general rules and principles which govern cross-examination of other witnesses. *Territory v. Kawano*, 469.

21. *Diagram of place of accident.*

A diagram exhibited to a witness for the purpose of illustrating a question need not be prepared by an expert surveyor. *Bright v. Quinn*, 504.

22. *Non-prejudicial error in excluding.*

The exclusion of evidence, in an action of trespass, relating to the extent of the injury caused to the plaintiff's property is not prejudicial when the jury finds for the defendant and has no occasion to consider the question of damages. *Cornwell v. Wailuku Sugar Co.*, 585.

23. *Admissions against interest—adverse possession.*

Admissions by an alleged adverse claimant of land to the effect that she was in possession by permission of the holder of the paper title are admissible to rebut the claim of adverse possession. *Cornwell v. Wailuku Sugar Co.*, 585.

24. *Proceedings in probate for distribution of personal property as evidence in an action to quiet title.*

A claim of title to land in an action to quiet title is not prejudiced by reason of the failure of one claiming as an heir to appear and make claim to a share of the personal property of the decedent in a probate proceeding had upon the administrator's petition for allowance of accounts and discharge.

A decree of distribution made in such proceeding is not evidence in an action to quiet title to land against one not a party to the proceeding. *Kaupena v. Kaio*, 653.

25. *Absent witness.*

Testimony given at a former trial of a case by the plaintiff is not admissible in evidence at a subsequent trial of the case on the ground that the plaintiff is absent from the Territory, where it appears that he had ample time and opportunity to apply for a continuance, as well as to have had his testimony or deposition taken, but failed to do so. *Redhouse v. Graham*, 717.

See also ARBITRATION AND AWARD, 5, 6; CRIMINAL LAW, 7, 8, 10, 12, 13, 18, 19; NEW TRIAL, 4; SPECIFIC PERFORMANCE, 2; TRIAL, 1, 2, 7, 13.

EXCEPTIONS.

1. *Bill of, sufficiency.*

The mere statement in a bill of exceptions that "the court filed

EXCEPTIONS—Continued.

its decision in said action, to which the plaintiff duly excepted," is not sufficient to bring to this court any question or error for review. *Kaehu v. Namcaloha*, 350.

See also APPEAL AND ERROR, 20; PRACTICE, 3.

EXECUTION.

1. *Sheriff's sale upon defective notices.*

Where a sheriff levies upon and sells property under a writ of execution upon defective notice, and the judgment debtor, having the opportunity to object, does not object until 23 days after the property is sold, the sale is valid. *Yamamoto v. Sakurai*, 678.

See also APPEAL AND ERROR, 21.

EXECUTORS AND ADMINISTRATORS.

See JUDGMENT, 4.

FELLOW SERVANT.

See MASTER AND SERVANT, 1.

FINAL ORDER.

See APPEAL AND ERROR, 10.

FORECLOSURE.

See MORTGAGES, 1.

FRAUD.

1. *In fact as well as in law.*

Where a daughter obtains a deed from her aged parents for land without consideration, other than their affection for her, the understanding on their part, induced by her, being that she only intended to mortgage the land to raise money with which to pay off a mortgage on her land, and that they would not be deprived of or in any way molested in the use thereof, but the intention of the daughter being to acquire full control of the land and to sell the same for her own use and benefit, and thus deprive her parents of the use and enjoyment thereof, presents a case of fraud in fact as well as in law, relievable in equity. *Keanu v. Kamanoulu*, 96.

GARNISHMENT.

1. *Creditor—debtor—claim, unliquidated.*

Sec. 2114, R. L., limits the remedy of garnishment to actions brought by a creditor against his debtor. The relation of creditor and debtor necessarily implies the existence of a debt. A claim for unliquidated damages for breach of a contract to sell a lease is not a debt within the meaning of the statute, and garnishment cannot be resorted to by the claimant. *Henriques v. Vinhaca*, 702.

GRAND JURY.

1. *Additional jurors.*

Of a grand jury panel of 23, three jurors had not been summoned, three had been excused by the court for the term, and five others temporarily. Twelve only appearing at a meeting, the court directed the drawing of five additional names from the appropriate jury box to fill the panel.

Held—that the additional names were validly drawn, and an indictment found at a meeting attended by the remaining twelve, the five new members and one of the jurors temporarily excused, was valid. *Territory v. Holt*, 240.

2. *Additional jurors, presumption as to regularity of empanelment.*

The presumption is that an additional drawing of grand jurors to complete a depleted panel is valid, and that the facts existed making it valid and were known to the court. *Territory v. Holt*, 240.

HABEAS CORPUS.

1. *Denial of writ.*

The writ of habeas corpus to obtain release from imprisonment under sentence imposed by the judgment of a circuit court on the claim by the petitioners that the court had no jurisdiction and that the judgment was void is denied, since the claim based on the same grounds has been presented on exceptions which were overruled, and is therefore finally adjudicated by this court, and the result of issuing the writ would be to remand the prisoners. *Soga v. Jarrett*, 120.

2. *Expiration of commitment.*

A commitment to a sheriff to detain M. "to await until the Governor of the State of California shall have the opportunity to issue a requisition to the Governor of the Territory of Hawaii, and the Governor of the Territory of Hawaii order the delivery" of M. to the Governor of California, even though validly issued, does not justify the detention of M. after the issuance of the requisition and the order. *In re Jew Yuen Mow*, 319.

HEALTH REGULATIONS.

See CONSTITUTIONAL LAW, 3.

HIGHWAYS.

1. *Pavements—discretion of supervisors.*

The selection of the kind of pavement best adapted to the public streets of Honolulu, if new pavement is required, or the decision as to whether paving is likely to be better than the macadamizing to which the public is accustomed, is a matter for the reasonable discretion of the Board of Supervisors. *Lord v. City and County of Honolulu*, 175.

HUSBAND AND WIFE.

1. *Contract for necessities.*

A married woman may contract to pay for articles which are necessary. *Von Hamm-Young Co. v. Welsh*, 599.

See also PRINCIPAL AND SURETY, 1.

INDICTMENT.

See CRIMINAL LAW, 11.

INFANTS.

1. *Female infant—marriage of—disability.*

Notwithstanding the marriage of a female infant, her disability of minority continues until she attains the age of 18 years. *Beckley v. Brown*, 596.

INHERITANCE TAX.

See STATUTES, 2.

INJURIES.

See LIMITATION OF ACTIONS, 1, 2.

INSTRUCTIONS.

1. *Comment on the evidence.*

A charge in a trial for larceny which contains remarks equivalent to "comment upon the character, quality, strength, weakness or credibility of any evidence," or upon "the character, attitude, appearance, motive, or reliability of any witness," (prohibited by Sec. 1798 R. L.) will not justify setting aside a verdict of guilty unless such statements are erroneously prejudicial to the defendants. *Territory v. Robello*, 7.

2. *Erroneous instructions cured by correct instructions.*

If a charge contains reference to an offence which omits an essential ingredient of it, but evidently refers to statements which fully define the offence in unmistakable terms, it will not constitute reversible error if it appears that the jury could not have been misled thereby. *Territory v. Robello*, 7.

See also APPEAL AND ERROR, 7, 14, 15; JURY, 3; PRACTISE, 3; TRIAL, 3, 4, 6, 9.

INTEREST.

See JUDGMENT, 1.

INTERPRETER.

See EVIDENCE, 20.

JUDGES.

1. *Disqualification of—Sec. 84 Organic Act.*

By the terms of Sec. 84 of the Organic Act, a judge who is related by affinity within the specified degree to a person who is suing as trustee under a will is disqualified from sitting in the case. *Smith v. Lindsay*, 262.

JUDGES—Continued.

2. *Disqualification—Sec. 84 Organic Act.*

By the terms of Sec. 84, Organic Act, a justice is not disqualified from sitting in a cause by reason of his relationship by affinity within the third degree to a son of the plaintiff, the son not being "interested, either as plaintiff or defendant." *Lucas v. Lucas*, 433.

3. *Disqualification.*

Under Sec. 84 of the Organic Act, a judge is not disqualified to hear an action of ejectment by reason of the fact that he was of counsel in an earlier action (for summary possession) in which the title to the same land was involved. *Territory v. Kapiolani Est., Ltd.*, 548.

4. *Disqualification.*

A circuit judge, who, previous to his appointment, acted as counsel for the petitioner in a petition for the appointment of a guardian, is not disqualified under Sec. 84 of the Organic Act, as amended May 27, 1910, from making an order requiring the guardian to file an inventory and account. *Guardianship of Hitchcock*, 553.

5. *Disqualification—pecuniary interest.*

Under Sec. 84 of the Organic Act as amended by the Act of Congress of May 27, 1910, a justice is not disqualified from sitting in a cause in which a corporation is a party by the fact of a relative by affinity or consanguinity within the third degree holding shares of stock in the corporation, the justice having no pecuniary interest in the issue of the cause either directly or through such relative. *Bruner v. Brewer*, 617.

6. *Disqualification—appeal from order made by one of the justices.*

Under Section 84 of the Organic Act as amended by the Act of Congress of May 27, 1910, a justice who while judge of a circuit court made an order which is attacked on appeal on the ground of lack of jurisdiction, is disqualified to participate in the hearing of the appeal, even though the order was interlocutory, and was based on a stipulation of the parties. *Bruner v. Brewer*, 617.

JUDGMENT.

1. *Nunc pro tunc—interest.*

In an action of contract against the Territory, the supreme court of the Territory rendered a judgment for the Territory, on Sept. 8, 1908. Later the United States Supreme Court reversed this judgment, and ordered judgment for plaintiffs for \$15,000, and plaintiffs then sought to have the final judgment in the Territorial supreme court entered as of Sept. 8, 1908, and interest allowed from that date.

JUDGMENT—Continued.

Held—that the judgment should be dated as of the date of its rendition, and interest allowed only from that date, and not the date of the first judgment. *Lowrey v. Territory*, 112.

2. *Motion to set aside.*

Sufficiency of evidence to support a finding by a district magistrate cannot be inquired into on a motion to set aside judgment made six months after judgment. *Bicknell v. Herbert*, 132.

3. *Effect upon one judgment debtor of release of another.*

A release by operation of law of one judgment debtor upon a ground not applicable to the other, does not operate to release the other. *Smithies v. Colburn*, 138.

4. *Executors and administrators.*

Upon the death of one judgment debtor, the other succeeds to the joint obligation of the judgment, and he is liable alone and not jointly with the executors or administrators of the deceased judgment debtor. The executors and administrators are not liable at law in such a case. *Smithies v. Colburn*, 138.

5. *Estoppel—res adjudicata.*

In an action of ejectment a judgment for defendants on demurrer is a bar to a subsequent action for the same piece of land brought by the same plaintiff against the same defendants, where the allegations in the declarations in the two actions are the same in all material respects. *Archer v. Naka*, 215.

6. *Reopening default—necessity of stating facts constituting defence.*

In an affidavit in support of an application to set aside a default, the statement that the appellant has a good and meritorious defence is insufficient. The facts relied upon should be set forth in order that the court may judge whether the defence is meritorious. *Territory v. Kapiolani Est., Ltd.*, 548.

7. *Void decree may be set aside.*

A decree of divorce rendered by a circuit judge without having acquired jurisdiction of the person of the libellee is void and may be set aside and vacated under the circumstances in this case. *Aki v. Aki*, 623.

8. *No evidence—nonsuit.*

The plaintiff offering no evidence in support of his claim, the court should direct a nonsuit to be entered. *Redhouse v. Graham*, 717.

See also EQUITY, 6; LIMITATION OF ACTIONS, 3; MORTGAGES, 4.

JUDICIAL NOTICE.

See COURTS, 2.

JURISDICTION.

See COURTS, 4; DIVORCES, 1; EQUITY, 10.

JURY.

1. *Challenges for favor.*

It is not error to find a juror not disqualified by an opinion formed by hearing general talk leaving an unconscious tendency to "lean to one side" and to "weigh one side a little heavier than the other," but not a fixed opinion as it would be changed if what he heard was not true and "be subject to the evidence on both sides," nor to find that a juror has sufficient knowledge of English although unable to define such words as "impartial," "bias," "prejudice," "testimony," or "obligation." *Territory v. Robello*, 7.

2. *Challenges for favor—instructions.*

Jurors in the employ of corporations controlled by the president of the ranch corporation owning the stolen property, who having friendly and even intimate relations with him desire to retain his good will, are not thereby disqualified, the judge upon their examination finding them to be "indifferent in the case." *Territory v. Robello*, 7.

3. *Instructions.*

Instructions need not repeat the essential ingredients of larceny whenever "taking," or "getting possession," is mentioned, if they have been already defined. The explanation given of reasonable doubt is approved. Certain comment on evidence does not justify setting aside verdict. *Territory v. Robello*, 7.

LANDLORD AND TENANT.

1. *Liability for sewer rates.*

Under a lease the lessor agreed to pay "the taxes levied" on and the lessees "all other charges" of the demised premises Held, that sewer rates are payable by the lessees. *Richards v. Ontai*, 335.

2. *Construction of lease.*

An agreement by lessees to "supply" to the lessor "free of charge all water required for buildings and grounds expressly reserved under this lease," construed, under the circumstances of the case, to require the lessees to pump water sufficient for the buildings in the same manner that it was being furnished at the date of the execution of the lease. *Richards v. Ontai*, 335.

3. *Action for rent—proof of title.*

In an action by a lessor against a lessee to recover rent the plaintiff is not required, as part of his case in chief, to prove title to the demised premises. *Kauai v. See Kang*, 690.

4. *Summary possession—action purely possessory.*

Proceedings under R. L. Sections 2089 and 2090, are purely of a possessory nature, and do not involve questions of title, and

LANDLORD AND TENANT—Continued.

their object is merely to put out of possession those who are in possession. *De Fries v. Kanakanui*, 712.

5. *Parties defendant—sublessee in possession.*

In an action of summary possession of land under the statute a sublessee in possession is a necessary party defendant. *De Fries v. Kanakanui*, 712.

6. *Parties plaintiff—grantee of lessor.*

A conveyance of leased premises carries with it the right to sue for the possession upon a forfeiture for breach of condition. *De Fries v. Kanakanui*, 712.

LARCENY.

1. *Evidence by recent possession untruthfully explained—verdict in part not sustained by evidence.*

Taking with felonious intent by defendants M. and K. may be inferred by recent possession untruthfully explained. There being no evidence other than hearsay of stealing by defendants R. and T., the verdict against them is not sustained. *Territory v. Robello*, 7.

LEASE.

See LANDLORD AND TENANT, 2; TENANCY IN COMMON, 1, 2.

LEGISLATION.

See TERRITORIES, 1, 2, 3, 4, 5.

LICENSE.

See STATUTES, 1.

LIMITATION OF ACTIONS.

1. *Injuries to person.*

Act 113, S. L., 1907, providing that "Actions for the recovery of compensation for damage or injury to persons or property must be instituted within one year next after the cause of action accrued, and not after," is, as regards the provisions therein, irreconcilable with that portion of a prior general statute, Sec. 1979, R. L., by which if a person receiving physical injuries is under 20 years, the time of six years therein limited for bringing his action does not begin to run until he has attained his majority: and hence, a minor, injured after the passage of the later act, must bring his action within a year thereafter. *Garcia v. Kekaha Sugar Co.*, 170.

2. *Injuries to land.*

Act 113, S. L., 1907, limiting to one year the time for bringing actions for physical injuries to land, repeals Section 1971 R. L., as to such limitations of time, by implication. *Kauha v. Palolo Land and Improvement Co., Ltd.*, 237.

LIMITATION OF ACTIONS—Continued.

3. *Judgments—appeals.*

No action lies on a judgment pending an appeal, and therefore the statute of limitations does not then begin to run. *Scott v. Henriques*, 370.

4. *Minors—actions against former guardian.*

The general rule is that the right of action by a ward against a former guardian accrues upon the ward's attaining majority or upon her marriage, and the statute of limitations commences to run from that date. *Lyons v. Maciel*, 378.

See also MORTGAGES, 1.

LOTTERY.

See NEW TRIAL, 6.

MAINTENANCE OF ACTION.

See ARBITRATION AND AWARD, 3.

MALICE.

See CRIMINAL LAW, 9.

MANDAMUS.

1. *Agreement to pay sewer rates.*

It is within the statutory powers of the Superintendent of Public Works to require an applicant for sewer connections to agree to "pay such rates annually for the use of the sewer as may be fixed." *McCandless v. Campbell*, 264.

2. *Remedy by.*

Mandamus lies to compel the Superintendent of Public Works of the Territory of Hawaii to grant the application of a property owner for permission to connect his premises with the public sewer when such owner has complied with all legal requirements to entitle him to connect, and no valid reason is shown for a refusal to issue the permit. *McCandless v. Campbell*, 411.

MAP.

See EMINENT DOMAIN, 2.

MASTER AND SERVANT.

1. *Fellow servant.*

A master owes to a servant the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work. If instead of personally performing this obligation the master engages another to do it for him, he is liable for the neglect of that other, which in such case is not the neglect of the fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. The question of liability turns rather on the character of the

MASTER AND SERVANT—Continued.

act than on the relations of the employees to each other. *Campbell v. Hackfeld*, 33.

See also NEGLIGENCE, 1.

MECHANICS' LIENS.

1. *Not maintainable upon structure alone.*

Under Section 2173, R. L., providing that "any person . . . furnishing labor or material to be used in the construction or repair of any building, structure, railroad, or other undertaking, shall have a lien upon such building, structure, railroad or other undertaking, as well as upon the interest of the owner of such building, structure, railroad or other undertaking in the land upon which the same is situated," a lien cannot exist or be enforced against any of the structures therein named, whether trade fixtures or not, separately from the interest of its owner in the land upon which it is situated. *Emmeluth v. Au In Kwai*, 180.

2. *Right of material-man—contract against liens.*

The right to a lien which is given by statute to a material-man cannot be destroyed by a provision against liens contained in the contract between the owner of the building and the contractor, to which contract the material-man was not a party, and of which he had no knowledge. *Lucas v. Hustace*, 693.

3. *Notice of lien.*

The instrument set forth in the opinion held not to be a notice of the existence or claim of a lien upon the owner's interest in the land. *Emmeluth v. Au In Kwai*, 180.

MINORS.

See LIMITATION OF ACTIONS, 4.

MORTGAGES.

1. *After acquired property.*

A mortgage of "all that certain rice plantation, . . . and all additions and accretions thereto or connected therewith or to be therewith connected, . . . and all other species of property part and parcel thereof, or to become parcel thereof," covers lands originally leased and afterwards either purchased or newly leased, as well as newly acquired leasehold or fee simple lands, which are essential and appropriate to the use and operation of the plantation as a "going concern," and will entitle the mortgagee to a priority over a subsequent mortgagee with actual or constructive notice of the property intended to be covered thereby. *Castle Est. v. Haneberg*, 123.

2. *Assignment of mortgage notes.*

The assignment of mortgage notes operates as a matter of law

MORTGAGES—Continued.

as an assignment of the mortgage, and of the mortgagee's powers under it, although there is no formal assignment of the mortgage. *Castle Est. v. Haneberg*, 123.

3. *Foreclosure of—statute of limitations.*

Foreclosure of a mortgage is not barred merely because the statute of limitations has run against the note for which the mortgage is given as security. *Kipahulu Sugar Co. v. Nakila*, 620.

4. *Deficiency judgment.*

The decree in a suit to foreclose a mortgage may not provide for entry of a deficiency judgment against the defendant when action on the note secured by the mortgage has been barred by limitation. *Kipahulu Sugar Co. v. Nakila*, 620.

See also PARTITION, 1; SPECIFIC PERFORMANCE, 2.

MULTIFARIOUSNESS.

See PLEADING, 1.

MUNICIPAL CORPORATIONS.

1 *Ordinance, title of.*

It is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent, void. *Territory v. Furu-bayashi*, 559.

2. *Ordinance—validity of provisions not germane to title.*

Where a municipal ordinance by its title purports to provide for the appointment of a plumbing inspector, to prescribe his powers and duties, and to establish rules for the plumbing and drainage of buildings and the construction of house sewers, and to prescribe penalties for the violation of its provisions; certain provisions of the ordinance making it unlawful to do any plumbing work in the municipality without first being registered at the office of the plumbing inspector; providing for the issuance of licenses to do such work upon payment of an annual fee; and requiring all applicants for licenses to furnish bonds to indemnify the municipality for injuries caused to any person by or through the licensee or his agents or servants in doing any plumbing work, are void, as having no reasonable connection with any element of the title. *Territory v. Furu-bayashi*, 559.

3. *Contract for patented pavement—competitive bids.*

The statute, Section 1, Act 62, S. L., 1909, does not require competitive bids for a contract by the City and County of Honolulu

MUNICIPAL CORPORATIONS—Continued.

for a patented street pavement as the same does not admit of competition. *Lord v. City and County of Honolulu*, 175.

MUNICIPAL OFFICERS.

See COSTS, 3.

NEGLIGENCE.

1. *Master and servant—evidence by servant—hazard of employment—directed verdict.*

In an action by a servant against his master to recover damages for personal injuries alleged to have been sustained by him as the result of the master's negligence, it was incumbent on the servant to show affirmatively a neglect of some duty on the part of the master, which the master owed to him while so employed, and which neglect was the sole and proximate cause of the injury. There being no evidence of negligence, the injury must be considered one of the usual and ordinary risks incident to the employment, which the servant assumed, and an order of court directing a verdict for the master is correct. *Freitas v. Pioneer Mill Co., Ltd.*, 385.

2. *Proof of, question for jury.*

Under the circumstances set forth in the opinion, the questions whether a collision between defendant's street car and plaintiff's wagon was caused by defendant's negligence, or by plaintiff's contributory negligence, or was the result of a mere error of judgment on the part of the motor man, were for the jury to decide under appropriate instructions. *Robinson v. Honolulu R. T. and Land Co.*, 426.

3. *Rights of street cars and vehicles on streets.*

The rights and obligations of persons using vehicles on the streets and of street railway companies operating cars thereon are mutual and reciprocal. A street car cannot overtake and run down a vehicle under ordinary circumstances without negligent or wilful wrong. *Robinson v. Honolulu R. T. and Land Co.*, 426.

4. *Contributory negligence—standing on running board of street car.*

In an action against a person operating an automobile to recover damages for negligence causing injury to the plaintiff, the fact that the plaintiff while a passenger on a street car, remained on the running board, does not necessarily constitute negligence, irrespective of whether there were vacant seats in the car. Whether or not the plaintiff was guilty of contributory negligence is a question to be determined by the jury in view of all the circumstances of the case. *Bright v. Quinn*, 504.

NEW TRIAL.

1. *Reversal of judgment, effect of.*

Upon the reversal of a judgment, the case stands as though the trial in which the judgment was rendered had not been had, and the defendant is at liberty at or before the second trial, to the same extent that he was at the former trial, to move for leave to amend his answer. *Scott v. Dillingham*, 4.

2. *Failure to file decision in accordance with statute.*

Where no error relied upon on appeal is claimed to have occurred prior to the rendition of the decision, which is erroneous for failing to comply with the statute (R. L., Sec. 1747, as amended by Act 117, L., 1909) requiring a written decision containing the reasons therefor, a new trial will not be ordered, but the judgment will be reversed, and the case remanded for entry of a decision which will comply with the statute, and the case then being in the same condition as it was originally upon the close of the evidence, the trial court may admit further evidence upon the application of either party or of its own motion. *Kahai v. Yee Yap*, 192.

3. *Newly discovered evidence—diligence.*

Affidavits in support of a motion for new trial on the ground of newly discovered evidence should show positively, not only that the evidence was not known before the verdict, but that the applicant or his attorney used due diligence to discover and produce the new evidence at the trial. *Territory v. Kum Foo Sung*, 195.

4. *Evidence—cumulative, impeaching and material.*

Affidavits must also show affirmatively that the new evidence is not merely cumulative to the evidence adduced at the trial, nor merely impeaching in character, and that it is material. *Territory v. Kum Foo Sung*, 195.

5. *Exhibition of dice not connected with case.*

Defendants were charged with being present at a place where a gambling game was being played. The evidence and claim of the prosecution was that the game was one played with cards. During the presentation of the case for the Territory, the prosecuting officer permitted certain dice, concerning which no evidence was adduced, to remain on a table in the court room within view of the jury.

Held, not a ground for a new trial. *Territory v. Nakamura*, 222.

6. *Lottery—che fa—proprietor of—player does not assist.*

The defendants were convicted on a charge that they did, "Assist in maintaining and conducting a certain lottery, to wit, "che fa," and the evidence tending to show that one of them was the proprietor and that two assisted, their conviction must be sustained; but as to the other three, the evidence tending to

NEW TRIAL—Continued.

show that they only purchased tickets, were present and played, they did not come within the charge as assisting in the maintenance of the lottery, and were wrongfully convicted. New trial granted as to them. *Territory v. Fuomori*, 344.

7. *Motion for—sufficiency of evidence.*

In this Territory the circuit judges are not authorized to set aside a verdict and grant a new trial where the sole objection to the verdict is that it is against the weight of the evidence, when there is more than a scintilla of evidence to support the verdict. *Robinson v. Honolulu R. T. and Land Co.*, 426.

8. *Newly discovered evidence.*

A new trial will not be granted on the ground of newly discovered evidence where the evidence referred to was known to counsel before the trial was concluded. *Aiona v. Ponahawai Coffee Co., Ltd.*, 724.

OATH.

1. *Administration of.*

An oath administered to a witness by the clerk that the evidence he shall give "shall be the truth, the whole truth, and nothing but the truth," omitting the invocation, "so help you God," which was correctly interpreted to the witness, the interpreter adding thereto the words, "so help you God," is valid. *Territory v. Kawano*, 469.

OPINIONS.

See **COURTS**, 3.

ORDER OF PROOF.

See **CRIMINAL LAW**, 7; **EVIDENCE**, 11.

ORDINANCE.

See **MUNICIPAL CORPORATIONS**, 1, 2.

OUSTER.

See **TENANCY IN COMMON**, 3.

PARDON.

1. *Power in Governor, not in legislature.*

The power of pardon is by Sec. 66 of the Organic Act, vested in the Governor exclusively, and cannot lawfully be exercised by the legislature. Under this power the Governor may grant pardons which are partial in their operation as well as those which are full and absolute. The legislature may not remit a fine judicially imposed. (Per Perry, J.,) *In re Cummins*, 518.

2. *Statute remitting fine invalid.*

An appropriation was made by the legislature of a sum of money "for the purpose of refunding" to a person duly convicted and

PARDON—Continued.

sentenced by a judicial tribunal "the fine" imposed under the sentence and paid by the accused. As to the fine, the executive had refused or at least failed to grant a pardon. The appropriation was not within the legislative power, and is invalid. (Per Perry, J.,) *In re Cummins*, 518.

PARTIES.

1. *Capacity to sue.*

Where a trustee and the beneficiary together secured a judgment against defendant, and the trustee then resigned, assigning the judgment to a new trustee "so far as I am authorized so to do," the beneficiary still retaining his interest in the judgment, the new trustee may properly join with the beneficiary in a suit on the judgment. *Smithies v. Colburn*, 138.

2. *Amendment—substitution.*

While the statute permits amendments to pleadings by adding or striking out the name of any party, it does not authorize the substitution of a new party for the sole party plaintiff. *Campbell v. Steiner*, 365.

3. *Trustee, cestuis que trustent.*

While the general rule is that in suits respecting trust property brought either by or against trustees, the cestuis que trustent as well as the trustees are necessary parties, still, where a suit is brought by a trustee for the recovery of trust property or to reduce it to possession, and it in no wise affects his relation with his cestui que trust, the latter need not be made a party. *Lucas v. Lucas*, 433.

PARTITION.

1. *Sale—mortgage.*

Upon a sale of land in a suit for partition between tenants in common, where some of the moieties are subject to a mortgage, the mortgagee having been made a party to the suit, the land should be sold clear of the incumbrance, and the mortgagee's claim paid out of the shares of the proceeds belonging to the mortgagors. *Brown v. Cornwell*, 457.

2. *Proof of impracticability of partition—report of commissioner.*

Where the allegation in a bill for partition that the premises cannot be partitioned without great prejudice has been traversed, it must be proved, but the defendants cannot complain of a finding by the circuit judge, based upon and supported by the report of a commissioner, that the allegation has been proven, where the defendants were given an opportunity to adduce evidence on the subject but failed to. *Brown v. Cornwell*, 457.

PARTITION—Continued.

3. *Trial of title.*

A bill for partition cannot be made the means of trying a disputed legal title.

If, in a suit for partition, an issue is in good faith raised concerning the extent of the petitioner's interest in the land, the proper course is to suspend the bill and give the petitioner an opportunity to sue at law. *Kaneohe Rice Mill v. Hoh*, 609.

See also PLEADING, 7.

PARTNERSHIP.

1. *Sale of partner's interest—rights of purchaser—multifariousness.*

A partner may sell his interest in the partnership, and one who having acquired the interest of a former partner, and having been received by the other partners in the place and stead of the former partner, becomes a partner under the original agreement, and is in a position to rightfully demand an accounting concerning all the partnership property and business transactions covering the entire period from the formation of the partnership down to the filing of the bill, and the allegation of those facts does not render the bill multifarious. *Lucas v. Lucas*, 433.

See also CONTRACTS, 7.

PAVEMENTS.

See HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 3.

PEDIGREE.

See EVIDENCE, 9, 10.

PENALTIES.

See CONTRACTS, 5.

PENDING ACTION.

See ARBITRATION AND AWARD, 2.

PLEADING.

1. *Certainty.*

Where in a bill to have a mortgage and agreement signed by a man, and his wife as surety, established as a lien upon the lands named therein, the agreement reciting that the mortgage was to secure, inter alia, an advance of money to enable the husband to establish a liquor business at W., the petitioner did not allege that the business was established at W., the bill, on demurrer, is bad for uncertainty. *Hackfeld & Co., v. Medcalf*, 56.

2. *Bill in equity—multifariousness.*

A bill is not multifarious where one general right is claimed, though the defendants may have distinct interests. *Castle Est. v. Haneberg*, 123.

PLEADING—Continued.

3. *Want of capacity to sue, how pleaded.*

Objection that the plaintiff has no legal capacity to sue should be by plea in abatement, unless the want of capacity appears on the face of the complaint, when it may be taken advantage of by demurrer. *Smithies v. Colburn*, 138.

4. *Election.*

A plaintiff who has recovered a judgment against two defendants, and who brings an action upon the judgment jointly against one judgment debtor and the executor of the other, may recover against the surviving judgment debtor upon the several liability of the judgment without amending his pleadings or discontinuing and bringing a new action. *Smithies v. Colburn*, 138.

5. *Ejectment—allegations of title.*

Under Section 1713, R. L., requiring an allegation in an action of ejectment as to "the kind of title claimed by the plaintiff," plaintiff need not set forth the mesne conveyances by which the title claimed passed to him. *Archer v. Naka*, 215.

6. *Amendment—substantial change of claim.*

An amendment to a bill in equity, intended to conform the pleadings to the facts proved, will not be allowed when its effect would be to substantially change the petitioner's claim. *Kaco v. Campbell*, 423.

7. *Ultimate facts.*

An allegation in a bill for partition that a partition "cannot be made without great prejudice" is not objectionable as a mere conclusion. It is a proper statement of an ultimate fact. *Brown v. Cornwell*, 457.

8. *Prayer for partition.*

Where, in a bill for partition, the prayer is for a sale of the land, and for general relief, a partition in kind may be decreed without a specific prayer therefor. *Brown v. Cornwell*, 457.

9. *Bill in equity—signature of counsel.*

The failure of counsel to sign a bill in equity may be taken advantage of, if at all, by motion; it is not a subject for demurrer. *Brown v. Cornwell*, 457.

10. *Amendment.*

Plaintiff, having mistaken the name of the defendant, should have been allowed to amend by substituting the true name. *Von Hamm-Young Co. v. Welsh*, 599.

11. *As to defendant—as to garnishee.*

A plaintiff may state a good cause of action against a defendant and fail to show facts sufficient to hold a garnishee, in which event the defendant would be put upon his defence and the garnishee would be discharged. *Henriques v. Vinhaca*, 702.

See also ELECTIONS, 15; EMINENT DOMAIN, 1.

PRACTICE.

1. *Petition for rehearing.*

When a petition for a rehearing presents to the court a question which was not presented in the prior writ of error, and which, not being therein assigned as error, was not before the court, the question cannot be considered on the petition for a rehearing. *Dillingham v. Scott*, 55.

2. *Petition for rehearing.*

In a petition for a rehearing of an action to set aside a deed for fraud, in which the relief to be granted under the decree is merely that the defendant reconvey all the interest, whatever it was, which the plaintiffs had conveyed to her, it is unnecessary to consider the rights of co-grantors not joined as parties. *Keanu v. Kamanoulu*, 108.

3. *Exceptions—instructions.*

A general exception to a series of instructions is insufficient. Instructions are properly refused if substantially given in the court's own language. *Territory v. Lau Chong*, 235.

See also CRIMINAL LAW, 1, 2, 3, 4, 5, 14; ELECTIONS, 16; EMINENT DOMAIN, 2.

PRINCIPAL AND AGENT.

See EQUITY, 3.

PRINCIPAL AND SURETY.

1. *Husband and wife.*

A wife may be surety for her husband, and the law of suretyship, requiring strict compliance with the contract on the part of the principal, applies.

A wife by signing with her husband a mortgage of her separate property to secure the husband's debt, is *prima facie* surety for her husband. *Hackfeld & Co. v. Medcalf*, 47.

PROCESS.

1. *Service by publication.*

Act 34, S. L., 1909, relating to service by publication, does not apply to district courts, and hence, in garnishee process in such courts, service upon a principal defendant is properly had under Sec. 2114, R. L., by leaving a copy of the summons at his "last or usual place of abode." *Bicknell v. Herbert*, 132.

2. *Substituted service—leaving at last place of abode.*

A. and his family occupied a dwelling at Waikiki, Honolulu, and then left the Territory with intention of abandoning his residence in Hawaii and establishing a home in Australia. Subsequently he returned to Honolulu on business, remaining one month and occupying a room at 184 So. Hotel St.

PROCESS—Continued.

Held, the latter was his "last and usual place of abode" within the meaning of R. L., Sec. 2114. *Bicknell v. Herbert*, 132.

3. *Right to amend officer's return.*

A return is amendable so as to show the officer's acts done by way of service. *Pasquoin v. Sanders*, 352.

4. *Certificate of copy, by sheriff.*

Under R. L., Sec. 1721, the copy of the summons and of the petition may be certified by any one of the officers designated to whom the documents have been entrusted for service. *Pasquoin v. Sanders*, 352; *Territory v. Kapiolani Est., Ltd.*, 548.

5. *Service—acceptance of.*

An attorney for a party in one case has no authority to accept service of process for the party in another case in which he is not attorney for the party and has not been specially authorized to accept service. *Akai v. Akai*, 623.

RECOGNIZANCE.

See WITNESSES, 2.

REHEARING.

See PRACTISE, 1, 2.

RELEASE.

1. *Evidence.*

Payment and release may be inferred from facts shown by the evidence in this case. *Lyons v. Maciel*, 378.

RENT.

See LANDLORD AND TENANT, 3.

REOPENING DEFAULT.

See JUDGMENT, 6.

RES JUDICATA.

See EQUITY, 8; JUDGMENT, 5.

RESERVED QUESTIONS.

See APPEAL AND ERROR, 1.

RETURN.

See PROCESS, 3.

REVERSAL OF JUDGMENT.

See NEW TRIAL, 1.

REVOCATION.

See DEEDS, 6.

SALE.

See PARTITION, 1; PARTNERSHIP, 1.

SELF SERVING DECLARATIONS.

See EVIDENCE, 14.

SEPARATE TRIALS.

See CRIMINAL LAW, 3.

SERVICE BY PUBLICATION.

See PROCESS, 1.

SEWER RATES.

See CONTRACTS, 2, 3, 4; LANDLORD AND TENANT, 1;
MANDAMUS, 1; TAXATION, 1, 2, 3.

SIGNATURE OF COUNSEL.

See PLEADING, 9.

SPECIFIC PERFORMANCE.

1. *Agreement to convey—construction.*

A contract to convey certain land by "a good and sufficient warranty deed," is in law an undertaking, not to furnish a deed good in form only, but to convey the title free from all encumbrances. *Frear v. Rosenbledt*, 682.

2. *Order to show cause—release of mortgage—evidence.*

Upon an order requiring the respondent in a suit in equity to show cause why he should not, in compliance with a decree directing him to specifically perform such a contract, furnish to complainant a release of an outstanding mortgage, evidence offered by the complainant is, at least under the circumstances of this case, admissible which tends to show that the mortgagee is willing to release the mortgage upon payment of a sum not exceeding the agreed purchase price, even though the evidence was not offered at the hearing before decree. *Frear v. Rosenbledt*, 682.

SPONTANEOUS EXCLAMATIONS.

See EVIDENCE, 19.

STARE DECISIS.

See COURTS, 6.

STATUTES CITED, CONSTRUED, APPLIED, ETC.

See page 793.

STATUTES.

1. *License to sell fish.*

Under Section 1418G, R. L. (Act 96, Laws 1907), a license is required for the sale of fish at a fixed place of business. *Territory v. Choy Dan*, 1.

2. *Construction and constitutionality of inheritance tax law.*

Act 102, S. L., 1905, which provides that "all property which shall pass by will or by the intestate law of this Territory from any person who may die seized or possessed of the same, or which or an interest in or income from which shall be trans-

STATUTES—Continued.

ferred by deed . . . or gift made in contemplation of the death of the grantor . . . or intended to take effect in possession or enjoyment after such death, to any person . . . in trust or otherwise . . . or by reason whereof any person . . . shall become beneficially entitled in possession or expectation to any property or the income thereof, shall be . . . subject to a tax . . ." is applicable to a transfer to a trustee of corporation stock to be disposed of at the death of the grantor according to the terms of the trust, he retaining the whole beneficial use during his lifetime, and also the power to revoke the transfer. The act is not unconstitutional by reason of discrimination or lack of uniform protection. *Brown v. Treasurer*, 41.

3. *Construction.*

In the enactment of Sections 3173-3178, R. L., and of Act 44, L. 1909, the legislature intended to include in each section all the elements essential to its individual completeness, and did not contemplate that on a charge for the violation of one section a conviction should be had solely upon evidence of the violation of another section. *Territory v. Fuomori*, 344.

4. *Contemporaneous construction of.*

Courts give great weight in a doubtful case to the contemporaneous and unvarying construction put upon a statute, by all persons dealing under it, and will not set aside such construction unless it is clearly erroneous. *Pasquoin v. Sanders*, 352.

5. *Construction of—restricted meaning.*

Every reasonable view which may be taken of the language used in a statute should be resorted to in order to save the act from invalidity, and if it is capable of a restricted construction which would avoid conflict with the fundamental law, that construction should be adopted. *Smithies v. Conkling*, 600.

6. *Office of title and preamble.*

Neither the title of a statute, nor its preamble, may be used to control positive provisions in the body of the act, but may be resorted to where the language of the enactment is ambiguous and the intent doubtful. *Smithies v. Conkling*, 600.

7. *Enactment of—three readings.*

Where a statute which originated in the House of Representatives passed three readings in that branch of the legislature, and also in the Senate, where it was amended, it was not necessary, after the Senate amendments had been concurred in by the House, to read the bill three times as amended. *Smithies v. Conkling*, 600.

8. *Doubt or uncertainty as to legislative intent.*

Legislation is not to be nullified on the ground of uncertainty

STATUTES—Continued.

if it is susceptible of any reasonable construction that will support it. *Smithies v. Conkling*, 600.

9. *Appropriations—inadequacy of fund.*

Under Act 143 of the Session Laws of 1911, claims should be paid in the order of their presentation till the fund is exhausted, the appropriation being insufficient to pay all the claims presented. *Smithies v. Conkling*, 600.

10. *Construction of.*

Under Act 143 of the Session Laws of 1911, merchandise license fees paid after June 14, 1900, for annual licenses bearing date anterior to the date mentioned are to be refunded only as to a portion corresponding to the fractional part of the year which remained unexpired on that date. *Smithies v. Conkling*, 675.

See also CONSTITUTIONAL LAW, 5, 6; PARDONS, 2.

STAY OF EXECUTION.

See APPEAL AND ERROR, 21.

STREET CARS.

See NEGLIGENCE, 3, 4.

SUBSTITUTED SERVICE.

See CONSTITUTIONAL LAW, 1; PROCESS, 2.

SUMMARY POSSESSION.

See LANDLORD AND TENANT, 4.

TAXATION.

1. *Sewer rates.*

Sewer rates are not taxes within the ordinary meaning of the term, and are not usually understood to be taxes. *Richards v. Ontai*, 335.

2. *Sewer rates, a tax.*

The sewer rates provided for by Section 1036 of the Revised Laws, in view of the provisions of Ordinance No. 6, of the City and County of Honolulu, and the plumbing regulations of the Board of Health, constitute a tax, and are, therefore, subject to the principles which govern the imposition and assessment of taxes. *McCandless v. Campbell*, 411.

3. *Illegal delegation of power.*

Sections 1036, 1037 and 1038, Revised Laws, in so far as they relate to the imposition, assessment and collection of rates for the use of the public sewers in the City and County of Honolulu, constitute an illegal delegation of the taxing power, and are invalid. *McCandless v. Campbell*, 411.

4. *Province of courts and legislature.*

The determination of the amount or rate of a tax is purely a legislative function, and if a business is one which may lawfully

TAXATION—Continued.

be taxed or regulated, the motive which prompted the legislature to act is beyond the reach of the courts. *In re Craig*, 483.

5. *Enforcing payment of tax unpaid when due.*

Where the amount of a tax is certain, and liability of the taxpayer has become fixed, the tax being due and payable, an action of assumpsit for its recovery may be maintained under Sec. 1269 of the Revised Laws, as amended by Act 89 of the Session Laws of 1905, though the tax has not become delinquent. *Keola v. Maui Auto Co.*, 575; *Keola v. Landgraf*, 584.

6. *Income tax—annuity from property held in trust.*

Under Chapter 99 R. L., the income tax on an annuity paid out of income derived from property held in trust is assessable against the annuitant, and not the trustee. *Wilder v. Hawaiian Trust Co.*, 589.

7. *Income tax on accumulations.*

Surplus income arising from property held in trust and accumulating in the hands of the trustee pursuant to the terms of a will is not taxable under Chapter 99, R. L., prior to the arrival of the time for its distribution. *Wilder v. Hawaiian Trust Co.*, 589.

TAXING POWER.

See CONSTITUTIONAL LAW, 3.

TENANCY IN COMMON.

1. *Effect of repudiation by one cotenant of unauthorized lease by the other.*

X. and Y. were tenants in common of land. Y.'s predecessor leased the entire parcel to W. Company without the knowledge of X.'s predecessor, who later brought an action to quiet title against Y. and the W. Company, and title to one half was adjudged to be in him. The W. Company continuing to occupy the entire parcel, X. later brought a bill in equity against Y. and the W. Company for his share of the rent.

Held—that the action brought by X.'s predecessor operated as a repudiation of the lease as to his undivided half of the land and the only remedy now open to X. was to proceed against the W. Company. *Helemano Land Co. v. Forster*, 252.

2. *Lease by one cotenant—other may ratify or repudiate.*

A tenant in common, where a lease has been executed by his cotenant without his knowledge or consent, may ratify the lease and claim his share of the benefits under it, or repudiate it and assert his rights against the lessee. He cannot do both, and having once made his election he is bound. *Helemano Land Co. v. Forster*, 252.

3. *Ouster—answer, effect of.*

Where the plaintiff in an action of ejectment sues for and claims

TENANCY IN COMMON—Continued.

the entire interest in and the right to the possession of all the land involved in the action, and the defendant, instead of claiming only a moiety, files an answer denying generally all the allegations contained in the plaintiff's complaint, the answer constitutes ouster, and relieves the plaintiff from the necessity of proving it by any other evidence. *Kaeahu v. Namealoha*, 648.

4. *Ejectment—extent of recovery.*

A plaintiff in ejectment may take judgment as cotenant according to the extent of his title. *Kaeahu v. Namealoha*, 648.

TERRITORIES.

1. *Legislative powers under Organic Act.*

By Section 55 of the Organic Act the legislature of this Territory was vested with the power of taxation and also the right to legislate in exercise of the police power. *In re Craig*, 483.

2. *Limitations on legislative powers of.*

An appropriation of money by the legislature to refund the amount of a fine paid pursuant to a judgment of a court of competent jurisdiction upon the assumption that the accused was innocent is an illegal attempt to exercise judicial functions (Per Robertson, C.J.,) *In re Cummins*, 518.

3. *Use of public funds for private purposes.*

It is beyond the power of the legislature to authorize the expenditure of money raised by taxation by way of gift or gratuity to individuals in the absence of, at least, a moral obligation to support the appropriation. (Per Robertson, C.J.,) *In re Cummins*, 518.

4. *Existence of moral obligation to justify expenditure ultimately a question of law.*

The courts are not always concluded by a legislative opinion or finding that a moral obligation existed to support an appropriation of public money for a private purpose. (Per Robertson, C.J.,) *In re Cummins*, 518.

5. *Rightful subject of legislation.*

Act 144 of the Session Laws of 1911, held to constitute an invasion of the judicial power, and an illegal attempt to divert public funds to private use, and hence, not a rightful subject of legislation within the meaning of Sec. 55 of the Organic Act. (Per Robertson, C.J.,) *In re Cummins*, 518.

6. *Legislative power of.*

A statute providing for the discharge of a moral obligation by means of an appropriation of public funds is rightful legislation within the meaning of the Organic Act. *Smithies v. Conkling*, 600.

TERRITORIAL OFFICES.

See COSTS, 4.

TITLE.

See ACTION TO QUIET TITLE, 1; PARTITION, 3.

TRESPASS.

1. *Continuing trespass.*

A declaration alleging in substance that on a certain day defendants broke and entered the land of plaintiffs, and deposited thereon water, rubbish, earth and stones, rendering the land unfit for cultivation, shows that the trespass consisted of a single tortious act, and that the injury is permanent and not continuing in its nature. *Kauha v. Palolo Land and Improvement Co.*, 237.

TRIAL.

1. *Verdict—evidence in support of.*

A verdict is not set aside because evidence was rejected or struck out, if it afterwards went before the jury. *Campbell v. Hackfeld & Co.*, 245.

2. *Evidence—plaintiff's habits.*

In an action to recover damages for personal injuries due to the alleged negligence of defendants' servants, it was held not error to refuse to allow plaintiff to ask his witness whether plaintiff was a drinking man, in the absence of any showing as to what bearing such evidence could have on the case. *Campbell v. Hackfeld & Co.*, 245.

3. *Instructions—facts for the jury, law for the court.*

Instructions were properly refused involving a finding by the jury of defendant's liability, or a finding by the court that the plaintiff was not negligent. *Campbell v. Hackfeld & Co.*, 245.

4. *Instructions—court not required to summarize facts to which instructions are to be applied.*

It is not the duty of the court to refer specifically to facts in the case to which its instructions are intended to apply. *Campbell v. Hackfeld & Co.*, 245.

5. *Waiver—voluntary submission of personal examination.*

The plaintiff waived his exception to an order that he be examined by a physician by voluntarily submitting his person for examination by the physician in presence of the jury. *Campbell v. Hackfeld & Co.*, 245.

6. *Instructions—effect upon verdict when inconsistent with each other or inapplicable to proved or admitted facts.*

Instructions which relate to matters vital to the case and are so clearly inapplicable to the proved or admitted facts that if followed, the verdict would be contrary to law, cannot be otherwise than prejudicial and require reversal of the verdict. *Apanu v. Kapano*, 399.

TRIAL—Continued.

7. *Setting aside verdict as against weight of evidence.*

Section 1798 R. L., providing that it shall not "Be construed to prohibit the setting aside of a verdict rendered by such jury in a proper case, as being against the weight of evidence, and the granting of a new trial therein," does not authorize a trial judge to set aside a verdict simply because in his judgment it is against the weight of the evidence, where the verdict is supported by more than a scintilla of evidence, and has not been attacked on any other ground. *Robinson v. Honolulu Rapid Transit & Land Co.*, 466.

8. *Remarks of court—argumentative instructions.*

Remarks and instructions of the court to the jury which are argumentative comparisons relative to the credibility of witnesses, commending one and disparaging the other, their testimony being vital and diametrically in conflict, are unfair, prejudicial, and erroneous. *Territory v. Kawano*, 469.

9. *Instructions, theory of.*

Instructions are given on the theory that they are expositions of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict responsive to the evidence adduced. They should be pointed, concise and definite, covering, however, the whole case, i. e., "the points of law involved therein." R. L., Sec. 1801. They should not be ambiguous, inconsistent, or contradictory; nor should they extend to abstract propositions of law. The court has no right to attempt to discredit instructions already given. *Territory v. Kawano*, 469.

10. *Argument of counsel—comments on conduct of party and of witnesses.*

Comment before a jury on the fact, disclosed by the evidence, that one of the parties paid for the lunches of two witnesses on two days during the trial is within the bounds of legitimate argument. *Bright v. Quinn*, 504.

11. *Instructions—form and arrangement.*

Instructions need not be given in the precise words requested, if they are substantially given in another form. *Bright v. Quinn*, 504.

12. *Cross-examination—matter of defence—direction of verdict.*

Evidence, in support of an affirmative defence, improperly admitted on cross-examination of one of plaintiff's witnesses during his case in chief cannot, at the close of the plaintiff's case, be made the basis of a directed verdict. *Kekaa v. Robinson*, 565.

13. *Direction of verdict—conflicting evidence.*

The evidence being sufficient to support a finding that P. was full brother of the intestate, it was error to direct a verdict

TRIAL—Continued.

based on the theory that the two were half brothers. *Uuku v. Kaio*, 567.

See also CRIMINAL LAW, 18.

TRUSTS.

See DEEDS, 3, 6.

TRUSTEES.

See PARTIES, 3.

ULTIMATE FACTS.

See PLEADING, 7.

VERDICT.

1. *Interpretation of general verdict.*

The verdict of a jury is to be read in the light of the issue as framed by the pleadings, and recognized in the instructions given by the court. *Makekau v. Kane*, 203.

2. *Idem.*

Where in an action of ejectment in which plaintiff, in his declaration claimed an undivided five twelfths interest in certain lands, and the court in its instructions referred to this amount as the amount claimed, a verdict by the jury, reciting that "we, the jury, . . . find for the plaintiff," will be construed as a finding for the plaintiff of an undivided five twelfths interest, and not that the plaintiff is entitled to the entire parcel. *Makekau v. Kane*, 203.

See also APPEAL AND ERROR, 5, 8; TRIAL, 1, 7, 13.

VOTES AND VOTERS.

See ELECTIONS, 1, 2, 3, 4, 5, 7, 8, 11, 12, 14, 15.

WAIVER.

See APPEAL AND ERROR, 16; CRIMINAL LAW, 15; TRIAL, 5.

WATERS AND WATERCOURSES.

1. *Dams—duty of owner.*

The owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will be capable of resisting the water of a stream in times of ordinary, usual, and unexpected freshets, and if he does not do so, he will be liable for any injuries resulting from his neglect. *Hau v. Palolo Land and Improvement Co.*, 172.

2. *Parties—reversioners.*

In a suit for the adjudication of water rights, under Chapter 143 R. L., commenced by a lessee of an ahupuaa, the holders of the reversionary interest may properly be named as parties defendant. *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 658.

3. *Allegations of petition—location of lands and time and place of diversion.*

WATERS AND WATERCOURSES—Continued.

In the petition in a suit for the adjudication of water rights, under Chapter 143, R. L., it is unnecessary to set forth the precise location of the lands of the respondents, provided it is alleged that they are situate within the Ahupuaa; nor is it necessary to allege the time of the commencement of the alleged unlawful diversion of water or the place of the taking. *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 658.

4. *Statement of existence of controversy.*

An allegation that the petitioner is the owner of and entitled to all the water of the stream in an ahupuaa except a definitely named quantity, and that respondents are wrongfully diverting more than that quantity against petitioner's protest, and under a claim of right, is a sufficient statement of the existence of a controversy justifying the maintenance of the suit. *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 658.

5. *Nature of proceedings under Chapter 143, R. L.*

Proceedings before a circuit judge under Chapter 143, R. L., for the settlement of a controversy concerning water rights were intended by the legislature to be simple, expeditious and inexpensive, and were not intended to be characterized by the formal procedure of equity. The petition in the case at bar held sufficient. *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 658.

WILLS.

1. *Construction.*

In the will of Bernice Puahl Bishop the direction to the trustees "to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances" refers to support and education at the Kamehameha Schools only, and not to support independently of education. *Smith v. Lindsay*, 330.

2. *Absolute title—alienation, restraint of.*

A testator devised property to his sons, "their heirs and assigns forever;" then, by a subsequent clause in his will, he declared "that neither of my sons . . . shall, during their lifetime, dispose of said interest to any person without the consent in writing of the other two first being had and obtained."

Held, that the attempted restraint by the testator is void, and the devisees acquired the absolute title to the property with the right and power to dispose of it at will. *Lucas v. Lucas*, 433.

WITNESSES.

1. *Credibility of for jury.*

It is for the jury alone to pass upon the credibility of witnesses and the weight of their evidence; and where the evidence of two witnesses for the same side is apparently inconsistent, yet

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if the jury is able to reconcile their testimony, or while disregarding the testimony of one, to accept as true the essential parts of the testimony of the other, the conclusion so reached will not be disturbed by the appellate court. *Territory v. Nakamura*, 222.

2. *Recognizances to appear before grand jury—inherent power of circuit judges to require.*

Circuit judges at chambers have not inherent power, aside from statutes, to require proposed witnesses to give recognizances to appear and testify before the grand jury, when the accused has not been committed for trial, or held to await the action of the grand jury, and no indictment is actually under consideration by the grand jury, or to commit the witnesses to jail without giving them an opportunity to furnish the recognizances. *In re Frank B. Craig*, 447.

3. *Statutory power of circuit judges.*

Under the circumstances above stated, circuit judges at chambers have not the said power to require recognizances or to commit to jail, either under R. L., Section 1899, or under R. L., Section 1648, or under Organic Act, Section 83, or under all of said sections. *In re Frank B. Craig*, 447.

WITNESS FEES.

See COSTS, 2.

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Rev. Stat. Sec. 721, Campbell v. Hackfeld & Co., 251.

" " " 755, Soga v. Jarrett, 121.

26 Stat. at Large, p. 826, In re Holt, 257.

29 " " " p. 492, In re Holt, 257.

30 " " " p. 448, Brown v. Treasurer, 46.

31 " " " p. 141, McCandless v. Campbell, 413.

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